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No. _____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

EDDIE BURRELL, ET AL.,
*APPELLANTS*

v.

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI,
ET AL.,
*APPELLEES*

**On Appeal from the United States District Court for the Southern District of Mississippi**

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## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Whether the plaintiffs have the burden of proving discrimination where an election held in violation of § 5 of the Voting Rights Act effects a permanent change in the state law.

2. Whether a substantial transfer of authority from one elected body to another, elected by a different constituency, must be approved under § 5.

3. Whether state action in violation of state election law may constitute a change requiring approval under § 5.

4. Whether plaintiffs may be estopped to assert a denial of equal access to the political process under § 2 of the Voting Rights Act or may be required to prove that the election outcome would have been different in the absence of such denial.

5. Whether the District Court properly followed *Hunter v. Underwood*, 471 U.S. 222 (1985), in concluding the Mississippi legislature lacked discriminatory intent.

6. Whether mere "political clout" is a legitimate state interest under the Equal Protection Clause of the Fourteenth Amendment.

## PARTIES TO THE PROCEEDING BELOW

The appellants in this action were plaintiffs in the District Court. They are Eddie Burrell, Albert Butler, John D. Eggleston, Charles Johnson, and Kenneth Vaughan, individually and in their official capacities as members of the Claiborne County Board of Supervisors; Willie Buck, Sr., Stella H. Jennings, Gerald B. Mitchell, Jr., and William H. Moulder.

The appellees in this action were defendants in the District Court. They are William A. Allain, Governor of the State of Mississippi, Edwin Lloyd Pittman, Attorney General of the State of Mississippi, and Dick Molpus, Secretary of State of the State of Mississippi, in their official capacities as members of the Mississippi State Board of Election Commissioners; Mississippi State Board of Election Commissioners; C.A. Marx, Nicki Martinson, and W.A. Wilkerson, in their official capacities as members of the Mississippi State Tax Commission; Mississippi State Tax Commission; and the State of Mississippi.

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I. The District Court erred in placing on the plaintiffs the burden of proving discrimination and in failing to enjoin or to vacate an election held in violation of § 5 of the Voting Rights Act which effected a permanent change in Mississippi law.

II. The District Court erred in ignoring precedent which requires transfers of governmental authority to be approved under § 5.

III. The District Court erred in holding that state action contrary to state law cannot come within the scope of § 5.

IV. The District Court erred in holding plaintiffs estopped to assert a denial of equal access to the political process under § 2 and in requiring proof that the election outcome would have been different had equal access not been denied.

V. The District Court erred in failing to find a discriminatory purpose on the part of the state in enacting and administering S.C.R. No. 519, H.C.R. No. 41 and H.B. No. 388.

VI. The District Court erred in finding "political clout" to be a legitimate state interest under the Equal Protection Clause of the Fourteenth Amendment.


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*v.*

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.,
*APPELLEES*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

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## JURISDICTIONAL STATEMENT

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### OPINION BELOW

The opinion of the United States District Court for the Southern District of Mississippi in this case was announced from the bench on December 18, 1986; a transcript is set out in Appendix A. The Court's judgment of December 31, 1986, from which this appeal is taken, is set out in Appendix B. A motion by these appellants to amend the judgment was granted on January 15, 1987; a copy of that order is set out in Appendix C, and a copy of the amended judgment is set out as Appendix D. Copies of the Court's opinion from the bench of May 30, 1986, and corresponding order of June 17, 1986, denying the plaintiffs' motion for a preliminary injunction, and its order of November 17, 1986, granting partial summary judgment to both parties, are set out as Appendices E, F and G.

## JURISDICTION

This action challenges two Mississippi constitutional amendments and one Mississippi statute under the Fourteenth and Fifteenth Amendments to the United States Constitution and §2 and §5 of the Voting Rights Act, 42 U.S.C. §§1973, 1973c. A three-judge court was convened pursuant to §5; jurisdiction was conferred upon the District Court by §5 and 28 U.S.C. §1331. The District Court entered its judgment on December 31, 1986, and it granted a motion to amend the judgment on January 15, 1987. On January 29, 1987, within the time permitted by 28 U.S.C. §2101(b), the appellants filed with the District Court their notice of appeal, a copy of which is set out as Appendix H. This appeal is being docketed in this Court within 60 days from the filing of the notice of appeal and within 90 days after the entry of the judgment, as provided by this Court's Rule 12.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1253.

## CONSITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent portions of the Fourteenth and Fifteenth Amendments to the United States Constitution, sections 2 and 5 of the Voting Rights Act, the Tax Injunction Act (28 U.S.C. §1341), sections 70, 112 and 273 of the Mississippi Constitution, Senate Concurrent Resolution No. 519, House Concurrent Resolution No. 41, House Bill No. 388, and pertinent portions of the Mississippi Code, are set out in Appendix K.

## STATEMENT OF THE CASE

The appellants are a biracial group of voters and elected officials of Claiborne County, a Mississippi River county of 12, 279 people, 74.5% of whom are black. Having the second highest concentration of minorities in the state, the county has long been extremely poor. Forty-two percent of its families were below the poverty level in 1969 and 26% in 1979. In 1984, the unemployment rate was 12.4%, and 93.9% of the county's registered job applicants in 1985 were black. While the unemployment statistics are not broken down by race, the 643 black job applicants represent 7.0% of the total black population of the county; since many black residents are either too old or too young to work, it is fair to conclude that black unemployment must be enormous.[1] While the county's income figures are not broken down

[1]These figures are drawn from Ex. P-133 and P-134. All citations to exhibits and depositions refer to the trial record compiled in the District Court.

by race, for Mississippi as a whole in 1980 the median family income for blacks was 52.21% of that for whites. App. I, pretrial order, ¶8.q.

This Court has long been intimately familiar with the history of blatant racial discrimination against black citizens of Claiborne County. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 898-906 (1982); *Connor v. Finch*, 431 U.S. 407, 424-25 (1977); *Allen v. State Board of Elections*, 393 U.S. 544, 550-51, 576-79 (1969);[2] *United States v. Mississippi*, 380 U.S. 128, 142-43 (1965), rev'g 229 F. Supp. 925, 932 (S.D. Miss. 1964). None of the black members of the Board of Supervisors, appellants herein, were elected until 1975, and the county had its first opportunity to elect a black to the House of Representatives in 1979. Even today, the government of Port Gibson, the county seat, is all white. App. I, pretrial order, ¶8.c.

The great engine of change in Claiborne County has been the decision of Middle South Utilities to build a nuclear electrical generating plant at Grand Gulf. In 1975, the county's last year under an all-white Board of Supervisors, the county's total assessment base was approximately $20,000,000; by 1984, the tax rate had been cut by a third, but the tax base had risen to almost $350,000,000, of which approximately $325,000,000 was attributable to the Grand Gulf Plant. Ex. P-97. Thus, by 1985 the black-majority Board of Supervisors was admninistering a county budget of $16,700,000, and was for the first time providing desperately needed improvements in health, eduation, and economic development for the poor citizens of the county. Ex. P-154.

The good fortune of a poor black county did not go unnoticed by its neighbors. As early as 1977, efforts were made in the legislature to distribute the tax base being developed at Grand Gulf among the local governments in the Mississippi Power and Light Company service area. Ex. P-1. In 1983 the Mississippi House of Representatives passed H.B. No. 961, Ex. P-3. which would have distributed 75% of the assessed valuation of all electrical generating plants around the service area, thus permitting each jurisdiction to apply its own tax rate to a portion of each plant. However, H.B. 396 as passed by the House in 1984, Ex. P-5, applied only to Claiborne County. Moreover, it entirely exempted Grand Gulf from local taxes, and imposed a state tax in lieu thereof, thus denying the county the right to set its own tax rate on any portion of the property.

By 1985 proponents of Grand Gulf redistribution had discovered that

[2]The challenged statute deprived Claiborne County of its right to elect its superintendent of education. App. I, pretrial order, ¶8.kk.

the in-lieu tax would violate §112 of the Mississippi Constitution, which expressly protected a county's "right to levy county and special taxes upon such assessment" of corporate and utility property. *Chicago R.I. & P.R. Co. v. Robertson*, 122 Miss. 417, 84 So. 449 (1920). Consequently, the House, considering an amendment to §112 dealing with the reclassification of property taxes,[3] voted to remove that protection from Claiborne County.[4] However, the white senator from Claiborne County, Jay Disharoon, told his colleagues that the proposal constituted a "white Legislature coming down on a black county." He continued, "You can't single out Claiborne County. It's either all or nothing." Ex. P-103. Douglas Anderson, one of two blacks in the Senate, agreed, arguing that "if it can be done to Claiborne County, it can be done to Harrison or Hinds or any other county." *Id.* On the last vote of the session, the amendment failed by a single vote in the Senate. 1985 Senate Journal 2445.

The issue returned in 1986 as H.C.R. No. 41, proposing to amend §112 to authoize the legislature to transfer taxing authority over Grand Gulf from Claiborne County to the State and to distribute the funds. During consideration on the floor, the House again adopted the proviso developed the previous year, assuring that all counties other than Claiborne would retain the constitutional protection of their right to tax utility property. As Representative Eric Clark explained his amendment:

> The way the resolution reads now, language was deleted from

[3] Both S.C.R. No. 519 and H.C.R. No. 41, the 1982 and 1986 amendments to §112 challenged in this action, involve the reclassification issue, as well as Claiborne County's right to tax Grand Gulf. Although §112 had commanded equality in asseessment and tax rates, Mississippi homes and farms historically had been grossly underassessed. After the Supreme Court ordered equalization enforced in *State Tax Commission v. Fondren*, 387 So.2d 712 (Miss. 1980), cert. denied, 450 U.S. 1040 (1981), the legislature proposed S.C.R. No. 519 and H.C.R. No. 41 so as to legitimize lower assessments for some classes of property. While S.C.R. No. 519 on its face does not deal with the taxation of nuclear plants, the defendants assert that it overrules the *Chicago* case and authorizes the imposition of an in-lieu tax.

[4] The House leadership sought to repeal that language without explaining its import to the membership. Joint Ex. 1 at 79-80. By the time the amendment returned from conference with the Senate, representatives of other counties having utility property had come to understand the threat, *id.*, at 95-97, and they defeated the first conference report. The conferees then restored the existing language, but added a new proviso removing that protection solely from the nuclear plant in Claiborne County. Ex. P-37. Happy to take Claiborne County's money so long as their own was protected, the requisite two-thirds majority of the House supported the second conference report.

> the constitution which guarantees the right of counties to levy taxes against utility and other corporate property. This amendment would put that guarantee back in the Constitution with one exception. And the one exception would be nuclear generating plants....

Joint Ex. 1 at 203-04. Of course, the only taxable nuclear generating plant in Mississippi is at Grand Gulf. Although Mississippi law ordinarily requires special elections on proposed constitutional amendments to be held in November, Miss. Code Ann. §23-5-203 (Supp. 1986), H.C.R. No. 41 set the election on this proposed amendment for June 3, 1986, only two months after its approval by the Legislature.

The only real controversy on H.B. No. 388, the bill implementing the new constitutional authority, involved how big the tax was going to be. Claiborne County wanted as large a tax as possible; the larger the pie, the larger Claiborne County's slice would be. The House leadership strongly resisted efforts to increase the tax rate from 2% to 3% or 4%. It was this very issue which led Chairman Merideth of the Ways and Means Committee to exclaim to his colleagues that the citizens of Claiborne County lacked the capacity for self government: "I want to tell you, they got no government over there. The money can't be spent wisely." Ex. P-11. Because of these convictions, the House conferees refused to bring out a report with a tax greater than 2%.[5]

The State's submission of H.C.R. No. 41 to the United States Department of Justice for approval under §5 of the Voting Rights Act was limited to the date of the special election. However, the Department's approval was not secured before the election, and these plaintiffs filed this action on May 23, 1986, seeking to enjoin the conduct of the election. Despite the District Court's agreement that preclearance was required, it refused to enjoin the election, concluding that the plaintiffs had not carried the burden of proving that such relief was appropriate and explicitly holding that their failure to present evidence of intentional discrimination on the part of the legislature should be held against them. App. F. The amendment was narrowly adopted by less then 51% of the vote, and, after postclearance by the Department on July 7, 1986, the Court permitted the amendment to go into effect.

The plaintiffs amended their complaint to attack the State's failure to secure preclearance of H.B. No. 388, which deprives the black ma-

[5]In the words of Representative Clark, the House eventually "accepted the bill, believing that this at least was something, and they might not get anything, in terms of tax money to their counties, if the bill was sent back to conference again." Clark deposition at 14.

jority of Claiborne County of jurisdiction over its tax revenues, transferring that authority to an overwhelmingly white legislature elected by a majority white population. The complaint also assailed the failure to submit the substance of S.C.R. No. 519 and H.C.R. No. 41, insofar as they authorized the discriminatory effect of H.B. No. 388. The plaintiffs also complained of the State's failure to seek approval of the election held pursuant to S.C.R. No. 519 and of several procedures used in conjunction with both elections, including the failure to print the text of the proposed amendments on the ballot in many counties. The plaintiffs also asserted that all of these election procedures resulted in racial discrimination, in violation of §2 of the Voting Rights Act. They further alleged that S.C.R. No. 519, H.C.R. No. 41, and H.B. No. 388 were adopted with a racially discriminatory purpose, and that they lacked a rational relationship to any legitimate state interest, in violation of the Fourteenth and Fifteenth Amendments.

On November 17, 1986, the District Court rendered partial summary judgment, dismissing the Voting Rights Act claims regarding S.C.R. No. 519 and H.B. No. 388. At the same time, the Court struck the defendants' claim that the Tax Injunction Act, 28 U.S.C. §1341, barred plaintiffs' remaining claims against H.C.R. No. 41 under the Voting Rights Act. On December 18, 1986, after a three day trial, the Court held that §1341 did require dismissal of the constitutional claims asserted in the complaint. The Court found that the challenged measures were not the result of racially discriminatory motives, and that the shortened campaign provided by the June election date did not result in discrimination in violation of §2. Although the conduct of the election did violate §5, the Court refused to vacate the election results, because of its conclusion that the plaintiffs had failed to prove a violation of §2. Judgment was entered in accordance with the Court's opinion on December 31, 1986.[6]

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

### I. THE DISTRICT COURT ERRED IN PLACING ON THE PLAINTIFFS THE BURDEN OF PROVING DISCRIMINATION AND IN FAILING TO ENJOIN OR

[6]The plaintiffs filed a separate state action challenging these measures under the Mississippi Consitution. Although the Chancery Court dismissed the complaint, the Supreme Court of Mississippi on February 10, 1987, enjoined the distribution of funds under H.B. No. 388 pending disposition of that appeal.

TO VACATE AN ELECTION HELD IN VIOLATION OF §5 OF THE VOTING RIGHTS ACT WHICH EFFECTED A PERMANENT CHANGE IN MISSISSIPPI LAW.

The District Court properly concluded that the setting of a date for the 1986 special election constituted a "standard, practice, or procedure with respect to voting," within the meaning of §5. *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985); *Garcia v. Guerra*, 744 F.2d 1159 (5th Cir. 1984).[7] Nevertheless, the Court refused to enjoin the 1986 election, concluding:

> [W]e may consider evidence bearing upon that question [of whether the conduct of the election has the purpose or effect of denying or abridging the right to vote on account of race or color] in fashioning our remedy. Neither party has chosen to present such evidence. The Court considers the absence of such evidence as a factor weighing in favor of the State's position that the conduct of the election should not be enjoined.

App. F at 44a.[8] Notwithstanding the Court's claims, it has no discretion to refuse to enjoin an impending violation of §5 or to permit any violation of §5 to effect a permanent change in the law.

Where a covered jurisdiction has administered or is preparing to admimister a new voting procedure which has not been precleared under §5, plaintiffs may seek relief from a local district court. This Court has held that, at the very least, a district court must require the submission of such a procedure to the Attorney General. *Hampton County, supra*, 470 U.S. at 182. This Court has not yet explained whether a district court has discretion to permit a prospective violation to occur, or when the results of such a violation may retrospectively be allowed to stand. Nevertheless, the principles which have guided this Court's prior decisions clearly indicate that the District Court in this case erred

[7]Notwithstanding this conclusion, the District Court in its order of November 17, 1986, dismissed without explanation all §5 counts regarding the 1982 election. At least insofar as the setting of the date is concerned, that judgment should be reversed summarily with instructions that the date be submitted for clearance under §5. *Hampton County, supra*, 470 U.S. at 182-83; *Berry v. Doles*, 438 U.S. 190 (1978). Accord, 52 Fed. Reg. 486, 493 (1987) (to be codified at 28 C.F.R. § 51.17 (b)).

[8]In its opinion issued after trial, the Court again stated "that reasons or bases for equitable relief have not been presented that are alleged to have caused an injury resulting from a violation of Section 5 which are independent of Section 2 or which are independent of the alleged constitutional violations." App. A at 5a.

in both respects.

While this Court has never specified the factors which may be considered by a court in fashioning relief under §5, it has made plain that the presence or absence of discrimination may not be considered. "The question whether the [challenged procedure] had a discriminatory purpose or effect is not an issue at this stage of the §5 litigation: that question must be initially decided by the District Court for the District of Columbia or the Attorney General." *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984). Even where the Attorney General eventually approves a change, that approval is not relevant in designing retrospective relief. *Hampton County, supra*, 470 U.S. at 183 n.36. Accord, *United States v. Board of Supervisors*, 429 U.S. 642, 645-47 (1977); *Perkins v. Matthews*, 400 U.S. 379, 385 (1971). The Act places upon plaintiffs no burden of proving the discriminatory effect or purpose of a challenged procedure. The District Court plainly erred in predicating its denial of relief upon plaintiffs' failure to do so.

Indeed, prior decisions clearly indicate that, once the plaintiffs have established that a challenged procedure violates §5, they are under no burden to produce any additional evidence at all:

> Generally, statutes that are subject to §5 are ineffective as laws until they have been cleared by federal authorities. *Connor v. Waller*, 421 U.S. 656 (1975) (*per curiam*).

*Hampton County, supra*, 470 U.S. at 175 n.19. Surely, the burden cannot be upon the plaintiffs to prove that the general rule should be given effect. The very purpose of §5 was "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). The burden must be upon the State to overcome the "presumption that jurisdictions which had 'resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees' would be likely to engage in 'similar maneuvers in the future [...].' " *McCain, supra*, 465 U.S. at 245, quoting *South Carolina v. Katzenbach, supra*, 383 U.S. at 334-35. Since the State failed to present any evidence at all, it is indisputable that its burden has not been carried.[9]

[9]There is also a burden which rests upon the District Court in a §5 case. This Court made plain in *Connor v. Finch, supra*, that a court must carefully explain why it denies requested relief. In that case, the very District Court from which this appeal is taken created many legislative districts which appeared to perpetuate white control. This Court found it to be the duty of the District Court "to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges." 431 U.S. at 425 (footnote

This Court has never rendered an opinion in a case where, as here, the plaintiffs have sought unsuccessfully to enjoin a prospective violation of §5. However, in *Holt v. City of Richmond*, 406 U.S. 903 (1972), this Court issued its own injunction in a case where the District Court had denied one. In that case, the Chief Justice, joined by Justices Blackmun and Rehnquist concluded, "I see no alternative but to grant the requested stay." Quoting the memorandum of the United States, he noted that " '[t]he legal effect of the...objection by the Attorney General, when coupled with the absence of a declaratory judgment from the United States District Court, District of Columbia, is to preclude the city from holding an election on an at-large basis.' " *Id.* (Burger, C.J., concurring).[10]

Justices Brennan and Marshall have gone so far as to express their opinion that a district court lacks discretion to deny retrospective relief, much less prospective relief:

> If, in cases like the present one, the remedy of ordering a new election is not to be required in all cases, the political units covered by §5 may have a positive incentive flagrantly to disregard their clear obligations and not to seek preclearance of proposed voting changes. For covered jurisdictions will then know that a §5 violation, if a suit is brought, can only result in their being denied the right to continue to enforce those voting changes that could not have received federal approval in the first place. As to all other voting changes, the sole effect of a suit for noncompliance with the approval provisions will be the limited sanction of requiring the political unit to obtain the federal approval which it should have received before any change was

[9]*Cont'd.*

omitted). This Court instructed the District Court to shape its remedy "so as to put to rest suspicions that Negro voting strength is being impermissibly diluted, or explain precisely why in a particular instance that goal cannot be accomplished." *Id.*, at 425-26. In this case, the same District Court has made no attempt whatsoever to allay suspicions that the early June election was called to minimize black access to the election process, contenting itself with the conclusion that plaintiffs had failed to prove such a purpose or effect.

[10]In *Georgia v. United States*, 406 U.S. 903 (1972), the District Court had enjoined legislative elections because of an objection, but this Court stayed that injunction without explanation, apparently because of its doubts that §5 actually applied under the circumstances. See *Georgia v. United States*, 411 U.S. 526, 531 (1973). In this case, by contrast, the District Court had no doubt of the application of §5, but nevertheless refused to issue an injunction as this Court had done in *Holt*.

instituted.

*Berry v. Doles, supra*, 438 U.S. at 194-95 (Brennan, J., concurring). For this Court now to make clear that a district court should always enjoin prospective conduct found to violate §5 would be fully consistent with these precedents. Indeed, that has been the almost universal practice of the district courts. See generally *Herron v. Koch*, 523 F. Supp. 167, 173 (E.D.N.Y. 1981) (citing cases); *Coalition to Preserve Houston v. Interim Board of Trustees*, 494 F. Supp. 738 (S.D. Tex. 1980).[11]

It is apparent that Congress did not intend to afford the district courts in the covered jurisdictions discretion to permit prospective violations of §5. The report of the ten senators who sponsored the 1970 amendments to the Act was quite explicit in this regard.[12] Quoting from a report of the Civil Rights Commission, the senators described the nature of a suit under §5:

> Such a lawsuit is very expeditious. The only proof required is that the new State provision relates to voting, that it has modified the law in effect as of November 1, 1964, and that is has not been submitted to the Attorney General or the District Court of the District of Columbia. No proof is required that the change has a discriminatory effect. On this showing, *injunction follows as a matter of course.*

116 Cong. Rec. 5527 (1970) (emphasis added). Cf. *Berry v. Doles, supra*, 438 U.S. at 195 (Brennan, J., concurring). In revising the bailout provisions of the Act in 1982, Congress made plain the seriousness with which it regards any violation of §5:

> The rights of voters under the Voting Rights Act are violated not only when the voting change is first enforced without preclearance, but thereafter while it remains in force

[11]There is only one reported decision in which a district court has denied a request to enjoin an upcoming election which violated §5. *United States v. County Commission, Hale County, Alabama*, 425 F. Supp. 433 (S.D. Ala. 1976), aff'd on other grounds, 430 U.S. 934 (1977). In distinguishing *Hale County* as a precedent, the District Court stated in *Herron*: "Three elections had already been held uner the challenged changes, so an injunction would merely have allowed incumbents to remain in office who had themselves been improperly elected." 523 F. Supp. at 174.

[12]There was no report of the Senate Judiciary Committee in 1970. This Court has previously regarded the report of the ten sponsoring senators as authoritative. See, e.g., *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 133 (1978).

> without having been precleared. Therefore, this requirement applies even if the voting change, when ultimately submitted, was not found objectionable.

S. Rep. No. 97-417, 97th Cong., 2d Sess. 48 (1982) [hereinafter cited as 1982 Senate Report]. Accord, H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 42 (1981). See also 1982 Senate Report at 58-59 & n.197 (expressing continuing reservations about courts outside the District of Columbia).

From its earliest encounters with §5, this Court has always ordered at least prospective relief for §5 violations. *Berry v. Doles, supra*, 438 U.S. at 191; *Allen, supra*, 393 U.S. at 543. Now that the scope of §5 has become generally understood throughout the covered jurisdictions, the district courts have shown themselves much more willing to grant retrospective relief. Indeed, in *Henderson v. Graddick*, 641 F. Supp. 1192 (M.D. Ala. 1986), the Court rejected the very result reached by the District Court in this case:

> [T]he very use of the word "preclearance" in the context of now submitting the actions of the Alabama Attorney General for such review is a misnomer, revealing the hollow nature of this claim. The law requires that changes in election rules be precleared. Unless there are unusual circumstances, changes may not be instituted now in the expectation of post facto ratification at some indeterminate future time.

*Id.*, at 1201-02. The Court continued:

> In this case it is abundantly clear that any change in the anti-crossover rule had to be precleared pursuant to Section 5. To allow this election result to stand would reward the perpetrator who deliberately caused a violation of its provisions. This is surely inappropriate under *Allen* and *Perkins*. See also *Dotson v. City of Indianola*, 514 F. Supp. 397 (N.D. Miss. 1981) (three-judge Court), aff'd 456 U.S. 1002, 102 S. Ct. 2287, 73 L.Ed.2d 1296 (1982).

*Id.*, at 1203. Accord, *Coalition to Preserve Houston, supra.*

If the District Court in *Henderson* is correct, then the District Court in this case must be wrong. The *Henderson* Court's refusal to permit the defendant to gain even a temporary advantage from a violation of §5 is perfectly consistent with the expressed intent of Congress to protect voters from all unauthorized changes in voting procedures, even when those procedures may ultimately be approved by the Attorney

General. 1982 Senate Report at 48. See also *Hampton County, supra*, 470 U.S. at 183 n.36. Certainly, Congress did not intend any jurisdiction which violated §5 to obtain a permanent advantage from its defiance of the law. In this case, there was no question that the setting of the election date had to be precleared; indeed, the State had submitted the date for preclearance, but chose to go forward without proper approval. This is not a temporary election of officials which can be altered at the next election, but a permanent change in the law, which can be amended only through the complicated procedures of §273 of the Mississippi Constitution. Before now, no district court has ever approved the permanent effectuation of such a change in violation of §5; this Court should take this opportunity to make sure that no court ever will.

## II. THE DISTRICT COURT ERRED IN IGNORING PRECEDENT WHICH REQUIRES TRANSFERS OF GOVERNMENTAL AUTHORITY TO BE APPROVED UNDER §5.

Since 1890, §112 of the Mississippi Constitution has provided that "no county...shall be denied the right to levy county and special taxes." H.C.R. No. 41, however, amended this section to "deny or limit a county or other taxing authority the right to levy county and/or special taxes on nuclear-powered electrical generating plants," and to authorize "a special mode of valuation, assessment and levy upon nuclear-powered electrical generating plants and provide for the distribution of the revenue derived therefrom." Passage by less than 51% in the special election coupled with the provisions of H.B. No. 388 giving the State Tax Commission taxing jurisdiction over nuclear reactors resulted in a reallocation of taxing power over the facility from the Board of Supervisors to the State.

Taken together, the measures in question clearly resulted in a change in a "standard, practice or procedure with respect to voting," requiring preclearance under §5. The District Court's dismissal of these claims by summary judgment was error. As early as 1978, the court charged by Congress with the responsibility for providing definitive interpretations of §5 concluded that preclearance is required with respect to any change involving reallocation "of governmental powers among elected officials voted upon by different constituencies." *Horry County v. United States*, 449 F. Supp. 990, 995 (D.D.C. 1978).

A subsequent decision from the Northern District of Alabama reaches the same conclusion on a set of facts remarkably parallel to those of

the instant case. Seventy-eight percent of the total population of Greene County, Alabama, is black. Pursuant to state statute, the County Racing Commission was charged with the responsibility of managing a local race track which, as described by the Court:

> generated $1,300,000 in tax revenue [in 1984] for the county's general fund. During that same year the county's total budget was $2,055,000. The race track thus was responsible for 63% of the total budget of Greene County. Not only [was] the race track the largest source of county revenue, but it [was] also the major employer in the county.

*Hardy v. Wallace*, 603 F. Supp. 174, 176 (N.D. Ala. 1985).

The Commission running the track consisted of three white members appointed by the legislative delegation representing Greene County in the State House and Senate. Following implementation of a court-ordered reapportionment plan, it became apparent that blacks would be elected to these positions. The legislature then enacted a statute providing that the Racing Commission "should consist of three persons appointed by the governor of the state for terms of eight years." *Id.* Following an attempt by the newly-elected black officials to have the "wholly unprecedented", *id.*, at 177, obstruction to local legislation repealed, suit was brought to enjoin its implementation under §5. Quoting *Horry County, supra*, 449 F. Supp. at 995, the Court granted the requested relief, concluding:

> [T]he change involved *reallocates governmental powers among elected officials voted upon by different constituencies*. Such changes necessarily affect the voting rights of the citizens of Horry County, and must be subjected to Section 5 requirements.

*Hardy, supra*, 603 F. Supp. at 178 (emphasis supplied by *Hardy* Court).

The fact that this case involves a nuclear reactor and *Hardy* a race track is the only real distinction between Greene County, Alabama, and Claiborne County, Mississippi. The former county is seventy-eight percent black while the latter is seventy-four. The sequence of events and results are identical: a white-controlled legislature targeting *the* major source of revenue in a black-controlled political subdivision and reallocating governmental power in a way which deprives blacks from exerting political and economic influence.

Such wholesale transfers of power clearly have "a *potential* for discrimination." *Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32, 42 (1978) (emphasis in original). This Court itself

has recognized that §5 may cover "the basic reallocation of authority from the state legislative delegation to the Council." *McCain, supra,* 465 U.S. at 250 n.17. Recognizing the authority of *McCain, Hardy,* and *Horry County,* the Justice Department has recently acknowledged the need for "a sufficiently clear principle...distinguishing covered from non-covered reallocations." 52 Fed. Reg. 486, 488 (1987). This Court should provide such guidance by reversing the judgment of the District Court.

## III. THE DISTRICT COURT ERRED IN HOLDING THAT STATE ACTION CONTRARY TO STATE LAW CANNOT COME WITHIN THE SCOPE OF §5.

The District Court's holding in this case creates a conflict as to whether violations of state law by state officials can ever contravene §5 of the Voting Rights Act. The courts in *Henderson v. Graddick, supra,* and *Curry v. Baker,* 802 F.2d 1302 (11th Cir. 1986), reached a conclusion diametrically opposed to the holding below, causing a conflict which will necessarily be resolved by this Court's judgment on this appeal.

At trial the plaintiffs proved that the state election commission violated established Mississippi statutory law by failing to print the entire proposed amendment and the concurrent resolution on the ballots in the June, 1986, and November, 1982, elections, as required by Miss. Code Ann. §23-5-141. Nevertheless, in rejecting the plaintiffs' §5 claim, the District Court stated:

> [W]e do not find that these omissions constituted a change within Section 5, and we rely for that proposition on the rationale of *United States v. St. Landry Parish [School Board],* 601 F. 2d 859 [(5th Cir. 1979)], which held that actions of State officials that are in conflict with the State's required procedures are not a change enacted or administered by the State within the meaning of Section 5, and therefore, the subject matter of the failure to print the text on all of the ballots is not within the ambit of Section 5 of the Voting Rights Act.

App. A at 5a - 6a. Using the same reasoning, the Court held that a violation of §273 of the Mississippi Constitution, which forbids packaging two separate amendments together for a single vote, could not violate §5. *Id.*, at 6a.[13]

[13]In its summary judgment order the Court had earlier dismissed the claim that the State violated §5 in adopting H.B. No. 388 without prior constitutional authorization.

The District Court's holding directly conflicts with *Henderson v. Graddick, supra*, in which the Attorney General of Alabama, a candidate for governor, encouraged participants who had voted in the Republican primary to cross over and vote in the Democratic gubernatorial runoff. This suggestion violated the Democratic Party's anti-crossover rule. 641 F. Supp. at 1194. In holding that the Attorney General's actions had to be precleared under §5, the Court stated:

> Once a law has been precleared it may be enforced whenever violated, and *any* change in the law or *any* practice inconsistent with the law must itself be precleared or be a violation of Section 5.

*Id.*, at 1201 (emphasis added). Accord, *Curry v. Baker, supra,* 802 F.2d at 1311.

Moreover, the District Court's interpretation of *St. Landry* is incorrect. The Fifth Circuit focused on whether a vote-buying scheme by several poll commissioners was a change that the state "has enacted or sought to administer". The Court noted that a state does not generally "enact or administer" a new voting procedure every time a state official deviates from the state's voting procedures, but stated:

> The commonsense meaning of "shall enact" indicates that action of a state, *as a body*, is envisioned and we think "shall seek to...administer" was added to cover situations when an enactment was not actually passed, but when a procedure was nonetheless widely administered with at least the implicit approval of the state governing authority.

601 F.2d at 864 (emphasis in original). Although the actions of the poll commissioners in that case did not rise to the level of state involvement needed to come within §5, the failure to use proper ballots in Mississippi has been "widely administered with at least the implicit approval of the state" over a number of years, and plainly falls within the scope of §5 as interpreted in *St. Landry*.

The District Court's misinterpretation of *St. Landry* reduces the effectiveness of §5 and paves the way for severe voting rights violations by permitting state officials to do indirectly what the state is prohibited from doing directly. This Court has stated that:

> [I]n determining if an enactment triggers Section 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination. See *Georgia v. United States,*[411 U.S. 526,] 34 [(1973)]; *Perkins v. Matthews, supra*, at 383-385;

*Allen v. State Board of Elections, supra,* at 555-556, n. 19, 558-559, 570-571.

*Dougherty County, supra,* at 42 (emphasis in original). Obviously, the violation of state law by state officials has a substantial "potential for discrimination." For example, a state official may initiate procedures which intimidate or otherwise prohibit blacks from voting or an official may encourage voting in violation of state law like the Attorney General of Alabama did in *Henderson*. Under the District Court's interpretation of *St. Landry*, such behavior will proceed unchecked despite its clear "potential for discrimination."

This Court mandated that the provisions of the Voting Rights Act be interpreted broadly to effectuate the Act's purposes.[14] The District Court's holding that actions of State officials cannot constitute a violation of §5 clearly does not do so; consequently, this Court should adopt the reasoning and holding of the *Henderson* Court.

## IV. THE DISTRICT COURT ERRED IN HOLDING PLAINTIFFS ESTOPPED TO ASSERT A DENIAL OF EQUAL ACCESS TO THE POLITICAL PROCESS UNDER §2 AND IN REQUIRING PROOF THAT THE ELECTION OUTCOME WOULD HAVE BEEN DIFFERENT HAD EQUAL ACCESS NOT BEEN DENIED.

The plaintiffs assert that the decision to hold the constitutional referendum in June instead of November shortened the campaign period and resulted in a denial to black Mississippians of equal access to the political process. These plaintiffs and others like them lacked sufficient opportunity to discover and explain the effects of H.C.R. No. 41 to the electorate, and black voters therefore lacked a full understanding of the ramifications of their vote. The District Court quite properly found this claim to state a cause of action under the Voting Rights Act:

> The position of this court is that while there is no guarantee under the Voting Rights Act to any voter that he has the right to cast an informed vote, it can be a violation of Section 2, given the appropriate circumstances, for the State to apply a procedure that has the effect of precluding an informed vote by black voters when that procedure does not have the same effect on other voters of the electorate.

App. A at 21a. This holding is fully supported by precedent and by

[14] Just this Term, the Court has held that even the annexation of a vacant lot may have a potential for discrimination. *City of Pleasant Grove v. United States*, ___U.S. ___, 107 S. Ct. 794 (1987).

the legislative history of the Act. *United States v. Post*, 297 F. Supp. 46 (W.D.La. 1969); 1982 Senate Report at 30 & n.119.

However, the District Court never conducted the detailed analysis of the evidence which the Act required. *Thornburg v. Gingles*,____U.S.____, 106 S. Ct. 2752, 2781 (1986). Instead, the Court simply found "that there was no denial of equal access to the political process in this case, because the evidence indicates that the black voter turnout was equal to if not greater than the white turnout in the June election." App. A at 29a.[15] Such a single-factor analysis is plainly insufficient under §2. Only last Term, this Court rejected an argument "that if a racial minority gains proportional or nearly proportional representation in a single election, that fact alone precludes, as a matter of law, finding a §2 violation." *Thornburg, supra*, 106 S. Ct. at 2779.

The Court made no proper analysis because of its view that the lack of equal access to information made no difference to the outcome of the election "because people were going to vote their self interest." *Id.*, at 27a. The Court erroneously placed the burden on the plaintiffs to demonstrate that they could overcome that inertia had they had more time. The Court found the plaintiffs' evidence that they could have solicited support at the supervisors' convention in July to be "only conjecture," *id.*, at 28a,[16] and their "contention that a longer campaign period would have provided black voters greater access to information" to be "speculative." *Id.*, at 29a.

This notion that the plaintiffs have the burden of demonstrating damage resulting from a violation of the Voting Rights Act was squarely rejected by the District Court in *Henderson v. Graddick*:

> The relevant issue for the Court is not whether plaintiffs can prove that Mr. Graddick's violation in fact changed the outcome of the runoff, but only whether his actions "could have" affected the outcome.
>
> ...

[15]This factual finding is, at best, a half-truth. The State's own expert, Dr. Stanley, testified that black voter turnout in November was approximately twice the white turnout. Thus, the State's decision to hold the election on H.C.R. No. 41 in June had an indisputably retrogressive effect on black voting strength. *Beer v. United States*, 425 U.S. 130 (1976).

[16]This finding was expressly based upon the supposed "testimony of supervisor Brooks who said that he could have called a black supervisors' meeting" had he been asked. *Id.* A review of Supervisor Brooks's brief deposition reveals that he never gave any such testimony. On the contrary, he testified that the black supervisors association did not even exist until July, after the conclusion of the June election. Brooks deposition at 7-8.

> The June 24 runoff was so close, the number of illegal crossover voters so great, and Mr. Graddick's violation so flagrant, this Court cannot take the chance that Mr. Graddick received the Democratic nomination as a result of his illegal actions.

641 F. Supp. at 1204. Accord, *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978); *Hamer v. Ely*, 410 F.2d 152 (5th Cir.), cert. denied, 396 U.S. 942 (1969); *Coalition for Education in Dist. 1 v. Board of Education*, 370 F. Supp. 42 (S.D.N.Y.), aff'd, 495 F.2d 1090 (2d Cir. 1974). The great undisputed but unmentioned fact in the District Court's opinion in this case is that H.C.R. No. 41 received only 50.7% of the vote, passing by a margin of 103,365 to 100,647. Ex. P-135. The District Court's refusal to set aside the election "where there is a serious violation and close election," *Henderson, supra*, 641 F. Supp. at 1204, is in stark conflict with *Henderson v. Graddick*.

Instead of determining the access of black voters to accurate campaign information, the District Court focused instead on its perception of the conduct of the plaintiffs. The Court ruled, "The evidence in this case shows that if blacks were denied access to information, it is because the plaintiffs and their group did not offer the information." *Id.* at 27a. The Court seemed especially impressed by its conclusion "that the deliberate decision had been made to litigate rather than campaign." *Id.* at 28a.[17] The Court's analysis betrays a misunderstanding of both the evidence and the law. It is nothing less than a holding that, regardless of the impact of the defendants' actions upon black voters, the plaintiffs are estopped to contest them because of their own actions.[18]

The only issue in a case under the Voting Rights Act is whether or not the Act has been violated. If black voters lack equal access to the political process, then it does not matter whether or not these plaintiffs did everything they could to improve that access. Simply put, there is no such thing as an equitable defense in a voting rights case. For instance, in *Henderson v. Graddick*, the District Court rejected a waiver defense almost identical to the argument upheld in this case. 641 F.

[17]The Court's criticism of this decision is scarcely comprehensible. The plaintiffs can hardly be blamed for failing to anticipate the Court's unprecedented decision to permit a concededly illegal election to proceed.

[18]The defendants' arguments, set forth at paragraph 7.b of the pretrial order, App. I, do not attempt to predicate their defense on the conduct of the plaintiffs. The Court's opinion thus resolved this case on a matter never placed in issue by the parties. It is hardly surprising, then, that the Court's grasp of the evidence is less than sure since the parties had no reason to present a full picture of the efforts made by the plaintiffs.

Supp. at 1199-1200. Accord, *City of Richmond v. United States*, 422 U.S. 358 (1975); *South Carolina v. United States*, 585 F. Supp. 418 (D.D.C. 1984); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982); *City of Port Arthur v. United States*, 517 F. Supp. 987 (D.D.C. 1981), aff'd, 455 U.S. 917 (1982); *Dotson v. City of Indianola, supra; Higgins v. City of Dallas*, 469 F. Supp. 739 (N.D. Tex. 1979).

Surely, Congress did not intend to place upon plaintiffs the burden of proving the extent of their own efforts to avoid a discriminatory result. Congress, like the courts, was well aware of the barriers faced by blacks in achieving equal access to the political process. This Court itself has recognized the discouragement that black participants in the political process may face where, as here, they must seek to overcome illegal activities by State officials. *Hampton County, supra*, 470 U.S. at 177 & n.24. See also *Kirksey, supra*, 554 F.2d at 145 n.13.

The evidence presented by the plaintiffs brings this case squarely within the legal principles announced in *Post, Henderson* and similar cases. They demonstrated, through experts and practicing politicians, that it takes more time and effort to educate black voters on particular ballot issues because of the past history of discrimination in Mississippi. Supervisor Brooks testified that "one of the problems with those constitutional amendments is that a lot of people don't read them, especially the semi-literate people that normally kind of rely on us to—when I say 'us,' people in office or leaders in the community to explain them to them." Brooks deposition at 18. The Court accepted the testimony that blacks "have lower education levels" and "less sophistication in politics." App. A at 26a. The Court concluded, "We do not accept that blacks are less intelligent as a class than whites; and to the extent the experts were saying that is part of the reason it takes longer to educate a black voter than a white voter, we don't accept it." *Id.* The plaintiffs agree with the District Court that the difficulties faced in educating black voters arise not from a lack of native intelligence, but from the history of discrimination which the Court properly found to have existed.[19] The plaintiffs do not understand the Court's defense of black intelligence

[19]The Court did suggest that these barriers could have been overcome in this case by a properly funded media campaign, since the plaintiffs "had access to millions of dollars in tax money." *Id.* The Court somehow overlooked the fact that, under Mississippi law, the plaintiffs lacked authority to use public funds in a political campaign. See Miss. Code Ann. §19-3-41 (1972); *State ex rel. Patterson v. Board of Supervisors*, 233 Miss. 240, 102 So.2d 198 (1958); *Adams v. First Nat'l Bank*, 103 Miss. 898, 60 So.770 (1913). White officials and interest groups, however, had extentive access to the news media. Exhibits P-107 and P-121.

as a rejection of the proposition that it in fact does take longer to educate a black voter than a white voter.[20]

In light of this history of discrimination, it is hardly surprising that Claiborne County's black supervisors, who until recently had been barred from the vote, should have felt intimidated from battling the Mississippi legislature at the polls. Their lack of "political clout", which the District Court somehow found to weigh in favor of the State, App. A at 30a, is in fact a result of the long history of racial discrimination which made the Voting Rights Act necessary in the first place. Even so, the Court itself recognized that the plaintiffs campaigned within their own county. *Id.*, at 22a. They also made preliminary contacts with supervisors in other counties. *Id.*, at 23a.

The Court neglected to note, however, that these plaintiffs were not the only black voters at work on this issue. The Chairman of the Black Legislative Caucus testified that he spoke to his constituents in Harrison County. Fredericks deposition at 18-19. Senator Anderson described the obstacles he faced in Hinds County educating his constituents on H.C.R. No. 41 and the ethics amendment which was also on the ballot. Anderson deposition at 18. Thus, regardless of the Court's views of the plaintiffs' efforts, it is apparent that black leaders did attempt to campaign on this issue, and they met substantial difficulties. Certainly, the Attorney General could seek relief on behalf of black voters; there is no reason that these plaintiffs cannot as well.[21]

Moreover, it is apparent that the Court erred in its assumption that these plaintiffs had all the information necessary for an informed vote. While these plaintiffs were reasonably well informed as to the Grand Gulf aspects of H.C.R. No. 41, they could not have known many of

[20]If the Court meant to reject that proposition, then its finding of fact is clearly erroneous. The plaintiffs' witnesses testified without contradiction that time and personal contact are of immense importance in spreading information throughout the black community. *Id.*, at 24a - 25a. The burden was on the State to demonstrate the falsity of that conclusion. *Kirksey v. Board of Supervisors*, 554 F.2d 139, 144-45 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977). This holding has been specifically endorsed by Congress. 1982 Senate Report at 29 n.114. Despite the State's burden, the District Court explicitly recognized that its only evidence on §2 came from its ecological regression expert, Dr. Stanley. App. A at 25a.

[21]The State asked the District Court to hold that these plaintiffs lacked standing to assert the rights of black voters denied equal access to campaign information. App. A. at 17a. The Court quite properly rejected this contention. *Id.*, at 21a. If the plaintiffs have standing to assert the rights of black voters, then it is entirely inconsistent for the District Court to hold that the plaintiffs' own actions preclude those voters from receiving relief.

the crucial facts regarding the provisions on reclassification of property taxes, and it was here that they would have had the greatest opportunity to find allies. Evidence which came to light after the election demonstrated that the amendment primarily helped the rich and was more damaging to the poor and middle class than originally believed. See, e.g., Ex. P-106, P-115. It defies reason for the District Court to suppose that the plaintiffs could have shared with voters information they themselves did not have.

Finally, if the plaintiffs were less active than they might have been, it was because of the very election procedure which brought them into court in the first place; as Supervisor Butler testified, they believed that the campaign period was too short to give them any chance of success. The Court's assertion that the plaintiffs "recognized that a campaign under these circumstances was not going to make any impression on people," App. A at 27a, completely overlooks what the circumstances were. The Court's assertion that two months is sufficient time to plan and execute a statewide political campaign, *id.*, at 28a, is simply wrong, as the Justice Department and Congress have previously recognized.[22]

It is not speculation but fact "that a longer campaign period would have provided black voters greater access to information." App. A at 29a. The record reflects without dispute that the defendants revealed the devastating effect of H.C.R. No. 41 upon the poor and middle class for the first time at the conventions of the tax assessors and the supervisors in July. Smith deposition at 11; Shaw deposition at 17-19. Black officials were present at those conventions. It is a fact that those black officials vote, and it is a fact that they explain issues to the voters they represent. Brooks deposition at 18.

The record is replete with evidence demonstrating that the more voters knew about H.C.R. No. 41, the less they liked it. As its chief Senate sponsor, Nevin Sledge, testified, "If we had had an election shortly after it passed, I was hoping for, you know, an overwhelming vote, and that's what I think we would have gotten earlier if we hadn't a good bit of active opposition on it." Sledge deposition at 29. Ray McGrath of the State Tax Commission's staff stated that if the voters had known how the Commission intended to administer the admend-

[22]In 1975 the Justice Department objected to a change in qualifying deadlines, noting its "inordinate burden...on potential independent candidates in terms of the resulting confusion, uncertainty and the limited period for obtaining the necessary petition signatures to qualify for the 1975 elections." Extension of the Voting Rights Act: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 532 (1981) [hereinafter cited as 1981 House Hearings].

ment, "it is doubtful that electoral margins would have been adequate for passage, considering the narrowness of the vote for passage, without such baggage." Ex. P-96. The executive director of the assessors association stated that, had he known the truth in June, "I'd put an ad in the paper and told them to vote against it." Shaw deposition at 28. If plaintiffs are required to present better proof than this in an election as close as this one, then no election can never be set aside for Voting Rights Act violations, because the proof will always of necessity be speculative.

It is apparent that the key to the Court's decision was its judgment "that a campaign under these circumstances was not going to make any impression on people because people were going to vote their self interest." App. A at 27a.[23] Nevertheless, the experience in the legislature, which had wrestled with this issue for years, plainly proves that perceptions of self interest can change, given time and effort. In 1983, Barney Schoby, a black representative from Adams County, had strongly favored sharing the Grand Gulf revenues, but by 1986, he had come to understand the true motivations of the Mississippi legislature:

> And shame on you if you vote—shame on you if in the back—well, not your mind—but shame on you if it is in your heart that you are voting to take this money simply because you feel that it's too much money for a black county to supervise.

Joint Ex. 1 at 187-88.

Barney Schoby and his black colleagues in the House of Representatives understood the truth about H.C.R. No. 41. That is why they opposed it by a margin of 13 to 3, while their white colleagues favored it by a vote of 95 to 9.[24] The District Court plainly erred in not giving the plaintiffs a chance to present to the voters a case that they had so successfully presented to their black colleagues in the legislature.

## V. THE DISTRICT COURT ERRED IN FAILING TO FIND A DISCRIMINATORY PURPOSE ON THE PART

[23]The Court quite clearly felt that residents of counties which would benefit from the Grand Gulf funds would overwhelmingly support the amendment. In fact, the testimony of both parties' experts shows that they did not. Compare Ex. P-144 with D-17. Whatever the explanation for this fact, it cannot be said that a full investigation and explanation of the complicated effects of H.C.R. No. 41 would not have affected the outcome of the election.

[24]The plaintiffs' expert, Dr. Allan Lichtman, testified that there was less than one chance in 100,000 that such a racially polarized vote would happen by accident. See Ex. P-145.

OF THE STATE IN ENACTING AND ADMINISTERING S.C.R. NO. 519, H.C.R. NO. 41 AND H.B. NO. 388.

Legislation which is racially neutral on its face nevertheless violates the Equal Protection Clause of the Fourteenth Amendment if "a discriminatory purpose has been a motivating factor in the decision." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977).[25] Once such proof has been made, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

This Court has previously affirmed findings of intentional discrimination based entirely upon circumstantial evidence. See *Rogers, supra*, 458 U.S. 622-27. The direct evidence of discrimination in this case is substantial. Charles Shepphard, the first black to represent Claiborne County in the House of Representatives, "was told not to bring a whole bunch of blacks to the Capitol to demonstrate in favor of Claiborne County's position when the committee was considering the Grand Gulf bill in 1980." App. A at 7a. The Court went on to find:

> Now, as far as Representative Shepphard is concerned, we feel that he was a truthful witness. We do not doubt his testimony that he overheard some persons during the course of the debate refer to "those niggers in Claiborne County"....

*Id.*, at 14a. Such explicitly racist behavior and remarks were deemed sufficient in *Hunter* to show that race was at least one motivating factor in the legislative decision. 471 U.S. at 228-29.

"The legislative or administrative history" and "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports," *Arlington Heights*, 429 U.S. at 268, plainly demonstrate that the legislature repeatedly chose to narrow its focus to this single black county and to hamstring its black government as much as possible. The final legislation, H.B. No. 388, which was authorized by the constitutional amendments adopted pursuant to S.C.R.

[25]Discriminatory intent is also sufficient to establish a violation of the Fifteenth Amendment, *Rogers v. Lodge*, 458 U.S. 613, 619 n.6 (1982), and of §2 of the Voting Rights Act, *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The District Court properly held that the Tax Injunction Act, 28 U.S.C. §1341, does not bar actions brought under that Act.

No. 519[26] and H.C.R. No. 41,[27] applied only to nuclear power plants; that meant that Claiborne County would not share in tax revenues from conventional plants, such as the ones in Adams, Bolivar, Hinds, and Washington Counties, all of which have white governments. Because the final legislation imposed a 2% state tax in lieu of local tax, instead of distributing the tax base itself, Claiborne County has no tax base to which it can apply its own millage rate, and is required passively to accept such funds as the State should choose to give it. Finally, the level of the in-lieu tax was less than half the tax rate on other utility property in the State. Claiborne County was thus handed the smallest feasible share of the smallest feasible pie.

Despite this overwhelming direct and circumstantial evidence of racial motivation, the District Court believed that the perceived predominance of economic motivations precluded the need for any further analysis.[28]

[26]Because Vice Chairman Williams had assured Representative Shepphard that the 1982 amendment to §112 would have no effect on Grand Gulf, the plaintiffs had no reason to campaign against the popular ratification of S.C.R. No. 519. The apparent effort to deceive Representative Shepphard lends support to the allegation that S.C.R. No. 519 was adopted with discriminatory intent. Even in the absence of such intent, this evidence raises at least the suggestion of a discriminatory result, demonstrating that the District Court erred in rendering summary judgment against the plaintiffs on their §2 action against the 1982 amendment.

[27]H.C.R. No. 41 permits statutory alteration of the tax status of nuclear plants by a simple majority vote. This constitutes an exception to §70 of the Mississippi Constitution, providing that all tax measures must be passed by a three-fifths vote of both Houses. As this Court made plain in *Arlington Heights*, "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." 429 U.S. at 267. House Constitution Committee Chairman Capps testified, "I would be less than candid if I didn't say to you that we on the House side were making every effort to get at this—these tax dollars and distribute tham and make it as easy as we could." Capps deposition at 19.

[28]The Court never explained what those economic motivations were. In its answers to interrogatories, the State claimed, "Apparently it is simply not feasible to attempt to set up a structure whereby the ad valorem taxes collected on non-nuclear power generating plants are redistributed throughout the area which they serve." However, examples of just such distributions appear throughout the record, Ex. P-55, P-56, P-58, P-65, P-72, P-74, and Ray McGrath of the State Tax Commission testified that such a redistribution could easily be made. Indeed, the State finally stipulated as much in paragraph 8.g of the pretrial order. App. I. The State also argued that it wished to redistribute taxes because the costs associated with nuclear plants "are ultimately borne by the rate payers such plants serve." However, in paragraph 8.ee of the pretrial order, App. I, the State stipulated that the costs of conventional plants are also borne by the ratepayers, but the State did not choose to redistribute those taxes. In any event, there is no longer any burden to bear, since the Supreme Court of Mississippi has reversed

This Court rejected a similar mixed-motivation argument in *Hunter*, finding that animus toward some whites did not justify discrimination against blacks:[29]

> [A]ppellants make the further argument that the existence of a permissible motive for §182, namely the disenfranchisement of poor whites, trumps any proof of a parallel impermissible motive....[I]t is clear that where both impermissible racial motivation and racially discriminatory impact are demonstrated, *Arlington Heights* and *Mount Healthy [City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977),] supply the proper analysis....[A]n additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks... .

471 U.S. at 231-32.[30]

The proper analysis is to determine, without regard to other contributing factors, whether racial discrimination "was a 'but-for' motivation for the enactment" of the challenged legislation. *Id.* at 232. On this issue, the State had the burden of proof. *Id.*, at 228. The District Court never even purported to consider whether or not H.B. No. 388 and H.C.R. No. 41 would have been adopted in their present form absent the undeniable presence of racial discrimination. During the ten years this issue was before the legislature, both of these measures pass-

[28]*Cont'd.*

the decision of the Public Service Commission to pass through Grand Gulf costs to consumers. *State ex rel. Pittman v. Mississippi Public Service Commission*, No. 56,762 (Miss. Feb. 25, 1987).

[29]Thus, the Court's observation that the abandoned nuclear plant owned by the Tennessee Valley Authority in predominantly white Tishomingo County "was the subject of similar legislation," App. A at 14a - 15a, is beside the point. The TVA's payments in lieu of taxes for its nuclear plant and its other Mississippi property were used to build bridges across the Tennessee-Tombigbee Waterway, conferring a substantial benefit upon Tishomingo County. Exhibit P-80 at 7-9. Representative Shepphard sought "similar" treatment for Claiborne County, but his amendment to use Grand Gulf taxes to improve U.S. Highway 61 throughout its length in Mississippi was defeated. 1986 House Journal 309.

[30]There can be no doubt that the plaintiffs have succeeded in demonstrating a "racially discriminatory impact." *Id.* H.B. No. 388 and the authorizing provisions of H.C.R. No. 41 deprive a black majority legislative body of jurisdiction over the tax receipts from Grand Gulf, and transfer that authority to an overwhelmingly white legislature. Moreover, the tax reclassification provisions of H.C.R. No. 41 severely disadvantage blacks in order to benefit the overwhelmingly white owners of expensive homes. The testimony of Professor Marcum, Tax Assessor Thompson, and Board Attorney Barefield on this subject went completely unrebutted by the State.

ed through numerous variations, almost any one of which was more favorable to Claiborne County than the final form. Even in 1986, an overwhelming majority of the House wanted to impose a larger tax on Grand Gulf, thereby providing more funds for Claiborne County, but the leadership denied them a chance to vote on such a conference report, because of Chairman Merideth's clearly stated view that Claiborne County lacked the capacity to govern itself.

Whether or not the District Court performed the proper analysis, the primary underpinning for its legal conclusion that the legislature acted for valid economic reasons is a clearly erroneous finding of fact."[11] The Court stated:

> Thus, as far as the primary evidence the plaintiffs introduced to show that the legislation was racially motivated—that is, the comments that there was no government in Claiborne County, that their funds were mismanaged, we find has a factual basis unrelated to race. There was evidence that the funds that Claiborne County was misspending some of their money, and there was no evidence that was introduced by Claiborne County that would refute the inferences that we could draw from that evidence.

App. A at 13a - 14a. Thus, the District Court fell into the same fallacy condemned by this Court in *Hunter*: One may not deprive blacks of their voting rights simply by branding them as thieves.

In fact, there is no evidence that Claiborne County misspent any of its money. The District Court did not identify any, nor will the State be able to find any in this record. The plaintiffs introduced no evidence to the contrary, because the State had never put forth such a claim as justification for the challenged measures. On the other hand, the plaintiffs did prove criminal convictions of supervisors in Jackson County and the Clerk of the Board in Washington County, both of which have white governments and electrical generating plants. Even if this record did contain evidence of misspending by the plaintiffs, there is no explanation other than race for the legislature's failure to visit the same retribution upon Jackson and Washington Counties. Cf. *Gomillion v.*

[11] This Court has skeptically received prior attempts to mask racial discrimination as economically motivated. *City of Pleasant Grove, supra.*

*Lightfoot*, 364 U.S. 339 (1960).[32]

This Court has not hesitated to declare clearly erroneous the factual findings of District Courts where the right to vote is at stake. See, e.g., *Hunter, supra*, 471 U.S. at 225; *McCain, supra*, 465 U.S. at 258. Where important constitutional rights are at stake, this Court has even reversed factual findings which have been fully reviewed and approved by the highest court of a state. *N.A.A.C.P. v. Claiborne Hardware Co., supra*.[33] Because the District Court failed to engage in the analysis required by *Hunter*, this Court can reverse without finding the District Court's primary or subsidiary findings of fact to be clearly erroneous. Nevertheless, this Court should not shrink from the conclusion compelled by the evidence in this case. The Mississippi legislature was impelled to adopt this legislation by the attitude described by one of its members, Representative Fred Banks, to the House Judiciary Committee in 1981: "The attitude simply stated is that it is not a nigger's place to make decisions that affect white folks." 1981 House Hearings at 548. The white leadership of the Mississippi legislature simply could not stomach the fact that the black government of Claiborne County had control over the tax funds derived from Grand Gulf. The legislature believes that the place of the citizens of Claiborne County is to take the money the legislature gives them and to make no complaints. Under the Constitution of the United States, it is the place of citizens of Claiborne County to govern themselves, and it is the place of this Court to guarantee to them that right.

[32]The District Court also clearly erred in finding "that Claiborne County did not cooperate with the legislature in conducting the hearings on Grand Gulf." App. A at 13a. It is not clear whether the Court felt that this supposed lack of cooperation somehow justified the punishment imposed on the county by the legislature. Nevertheless, the finding itself cannot be supported by the record. Chairman Montgomery of the Senate Finance Committee testified that the county fully cooperated in the Committee's investigations. Representative Stubbs testified that he knew of no request for information from the House to the plaintiffs before October 28, 1985, the date of a letter from the interim study committee on property taxation to Tax Assessor Evan Doss of Claiborne County, a copy of which was sent to the Board. Ex. P-77, Appendix. That letter, which was not even addressed to the plaintiffs, requested massive amounts of information within two weeks. As Vice Chairman Williams's testimony made clear, most of this information was eventually provided by the plaintiffs. Ex. P-172.

[33]In that case, the Court went so far as to place upon the respondents the burden of filing a supplemental brief detailing the supposed record support for the findings challenged by petitioners. 458 U.S. at 896.

## VI. THE DISTRICT COURT ERRED IN FINDING "POLITICAL CLOUT" TO BE A LEGITIMATE STATE INTEREST UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

H.B. No. 388 draws a distinction between citizens of Claiborne County and citizens of all other counties in Mississippi. All other counties are entitled to tax all utility property located within their boundaries. Claiborne County is denied this right. In upholding this distinction,[34] the District Court said, "The political and practical problems for not including other utilities constituted a reasonable explanation, as far as this court is concerned, as to why other utilities were not included." App. A at 14a.[35] The Court concluded, "Claiborne County...neither has the political clout nor, in this case, the equity of argument to overcome the demands of the rest of the counties." *Id.*, at 30a.

There can be no doubt that H.B. No. 388 is rationally related to the interest identified by the District Court; the representatives of the other 44 counties in the Grand Gulf service area decided that they wanted Claiborne County's tax money, and they took it. The question is whether sheer "political clout", the unbridled appetite of the majority to prey upon the minority, constitutes a legitimate state interest under the Equal Protection Clause. Because that clause has always been understood to protect "discrete and insular minorities" from defects in "the operation of those political processes ordinarily to be relied upon to protect minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), there can be no doubt that raw political will cannot constitute a legitimate interest.[36]

[34]The Court made findings on this issue, notwithstanding its conclusion that 28 U.S.C. §1341 barred its jurisdiction over the plaintiffs' constitutional claims. App. C. The Tax Injunction Act applies only when there exists a "plain, speedy and efficient" remedy in state court. Neither the Court nor the State has ever identified such a remedy, and the Court accordingly erred.

[35]In fact, there were no practical problems precluding the distribution of revenues from conventional plants. See n.28,*supra*.

[36]Conventional plants were deleted from the legislation by Chairman Simpson of the House Rules Committee, who began accumulating his political clout in the legislature in 1963, two years before the Voting Rights Act secured to the black citizens of Claiborne County their right to vote. Claiborne County's lack of the political clout which comes with seniority in the House is indisputably a direct result of a century of intentional discrimination against black voters. More particularly, it stems directly from the failure of this same District Court to provide fair representation for the county's black citizens. *Connor v. Finch, supra*, 431 U.S. at 424.

This Court recently struck down an effort by the Alaska legislature to distribute the massive revenues from the State's oil reserves. *Zobel v. Williams*, 457 U.S. 55 (1982). The State simply divided the bulk of these revenues among its citizens on the basis of the length of their residence in Alaska. The State claimed its intent was "to reward citizens for past contributions," *id.*, at 63; presumably, long-time citizens had greater political clout than did newcomers. This Court simply found that such an "objective is not a legitimate state purpose." *Id.* Even in splitting up a pile of money, something more than mere political will is apparently necessary to satisfy the Fourteenth Amendment.

In *Metropolitan Life Ins. Co v. Ward*, 470 U.S. 869 (1985), Alabama granted a lower tax rate to its domestic insurance companies. The State claimed that its law "encourage[d] the formation of new domestic insurance companies in Alabama." *Id.*, at 876. While such an argument is undoubtedly correct, this Court found the objective not to be legitimate. "Indeed, under the State's analysis, any discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another." *Id.*, at 882 n. 10.

Here, the District Court has found it a legitimate state purpose to favor the residents of 44 other counties at the expense of the residents of Claiborne County. Mississippi has no more legitimate interest in the revenues from Grand Gulf than Ahab had in Naboth's vineyard. I Kings 21. Under *Metroplitan Life* and *Zobel*, Mississippi is not simply free to distribute funds with regard to nothing but political clout. Consequently, these measures indisputably violate the Fourteenth Amendment.

## CONCLUSION

The District Court's opinion is so plainly wrong in so many ways that this Court may reasonably conclude that there is no danger that it will ever mislead any other court. Were this case before the Court on a petition for certiorari, that conclusion might be sufficient to support a denial of the writ. Nevertheless, because this case was brought under §5 of the Voting Rights Act, Congress intended this Court to serve as the Court of first and last appeal. This Court has often intervened in the past to secure justice for Claiborne County's citizens, and it must now do so again.

For the reasons stated herein, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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No. _____

Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

EDDIE BURRELL, ET AL.,
*APPELLANTS*

v.

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI,
ET AL.,
*APPELLEES*

**On Appeal from the United States District Court for the Southern District of Mississippi**

## APPENDIX

*MICHAEL B. WALLACE
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# APPENDIX A

**United States District Court**
**SOUTHERN DISTRICT OF MISSISSIPPI**
**JACKSON DIVISION**

—

**CIVIL ACTION NO. J86-0373(L)**

—

**December 18, 1987**

**Eddie Burrell, et al.,**
*Plaintiffs*

—

**William A. Allain, et al.**
*Defendants*

—

## OPINION OF THE COURT

Honorable E. Grady Jolly, Jr., Honorable Tom S. Lee, Honorable Henry T. Wingate, Jackson, Mississippi, December 18, 1986.

—

Appearances:
For the Plaintiffs:
Mr. Michael B. Wallace
Mr. E. Clifton Hodge, Jr.

For the Defendants:
Mr. T. Hunt Cole
Mr. Richard Jones
Mr. Robert Sanders

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Judge Jolly:

This opinion is going to probably be a little lengthy, so the Marshal will keep the door closed. Unless there is an emergency, we would ask that you not leave or no one enter while the opinion is being delivered. And you're going to have to also bear with me a little bit because I have a lot of papers here. You can imagine that there are a lot of changes and switches and improvision when you have three judges, all with pretty strong opinions about what ought to be said; and I'm hoping that I have put together here something that will suit us all after we have conferred about it.

The Grand Gulf Nuclear Power Plant is located in Claiborne County and is the only existing and operating nuclear electrical generating plant in Mississippi. From 1975 till 1985, the assessed value of Grand Gulf rose dramatically from 2.3 million to about 370 million dollars. The 1975 assessment produced 143 thousand dollars in revenue to Claiborne County, and the 1985 assessment produced somewhere around 14 million dollars.

In 1986 the true value of Grand Gulf is approximately three billion dollars, and its assessed valuation is approximately 700 million dollars. The assessed value of Grand Gulf is more than 25 times higher than the next non-nuclear generating facility in the affected MP&L service area. The next highest valued non-nuclear generating facility in the state is valued at less than one-tenth the value of Grand Gulf and constitutes only a relatively small portion of the assessed value of the county in which it is located.

The utility pays property taxes to Claiborne County which are passed through to consumers in the service district in the form of higher electical bills. Prior to the legislative enactment, the other 44 counties and municiplalities in the service area received no share of the ad valorem tax revenue of Grand Gulf. It was all paid to Claiborne County. At the same time, the property taxes generated by Grand Gulf created a trove of about 13.5 million dollars annually for the local government of Claiborne County, which has a population of about 12,000 people; and that compares to a previous annual income for this small county, according to the testimony, of about 600 thousand dollars. So that's the background that we view the subsequent events.

Efforts to divert tax money from Grand Gulf to other counties go back almost ten years. Jay Disharoon, who then represented

Claiborne County in the House of Representatives, testified that he managed to prevent these measures from coming to a vote in the house in 1977, 1978 and 1979. In 1980 the House Ways and Means Committee held its first meeting on proposals to divert tax money from Grand Gulf, and Grand Gulf came to the floor in 1983 but was defeated by Senator Disharoon and his allies in the Senate.

In the 1986 session, the Mississippi legislature enacted House Bill 388, which exempted nuclear power plants from local ad valorem taxes, levying a special state in-lieu tax and providing for distribution of the tax revenues to Claiborne County 15 percent and the State General Fund 10 percent and to other counties in the MP&L district.

After numerous attempts to compromise on the Grand Gulf issue, a special House of Representatives select committee on property taxation reported HCR 41, which amended Section 112 of the Mississippi Constitution. In general terms, HCR 41 established five classes of property, tax assessment ratios, and further specifically provided that the legislature could deny or limit a county's authority to levy taxes on nuclear plants, and that it could provide for distrubution of such revenue. In final form, HCR 41 passed both houses of the legislature in overwhelming fashion.

The referendum was set for June 3, 1986, and the legislature's stated purpose in setting the June election was to permit the county tax assessors to adjust their assessment roles in July and August for the next tax year in case the proposed amendment was passed. A delay in the referendum vote until November would have meant that reclassification and assessment ratio portions of HCR 41 would have been delayed until 1988, the next tax year. We do note that during the same June election, voters were also asked to consider a second proposed constitutional amendment: HCR 63 that was unrelated to the Grand Gulf issue.

With respect to this individual action before us, nine individual plaintiffs brought this action on May 23, 1986, seeking to enjoin the June 3 election until preclearance by the Attorney General could be obtained, pursuant to Section 5 of the Voting Rights Act. This three-judge court found a violation of Section 5 with regard to the date of the election, in that it constituted a change in a practice or standard as provided in Section 5 of the Voting

Rights Act. We did not, however, enjoin the election but did enjoin the implementation of the constitutional amendment until the Attorney General's approval was obtained, and that approval was obtained in July 10, 1986, and the court dissolved the injunction at that time.

Since the election and since the original Complaint was filed, the plaintiffs have filed four Amended Complaints. This case was tried on November 24 through November 26, 1986.

The issues that were presented to us at trial for our determination are the Section 5 issues relating to, one, the date of the election that was in June instead of November; two, certain ballots in certain counties were alleged not to contain the full text of HCR 41 as required by State law, and that was alleged to be a change that had not been precleared under Section 5. The plaintiffs also contended that the amendment's establishment of five property tax classes and its special treatment of nuclear plants constituted a change within the meaning of Section 5 that had not been precleared. They also alleged that the proposed amendment contained multiple amendments in violation of the Mississippi Constitution that requires constitutional amendments to be voted on one amendment at a time, and finally they alleged that Section 5 of the Voting Rights Act was violated when the defendant did not preclear the amendment provision requiring a simple majority instead of a two-thirds majority vote on tax and revenue matters.

In addition to Section 5 issues, the plaintiffs alleged a violation of Section 2 of the Voting Rights Act, the primary claim in connection with Section 2 being that the black voters had been denied equal access to the political process because they had been denied access to equal information because of the shortened period of campaign before the election.

Plaintiffs also alleged in issues that we've got to dispose of today that constitutional rights of the plaintiffs were violated—that is, the Fourteenth Amendment and the Fifteenth Amendment rights—were violated by the legislation.

Let me address first the Section 5 issues, because they all, from our point of view, can be simply disposed of.

First, with respect to the Section 5 violation that is alleged in connection with the election being held in June instead of November. It is true, of course, that a violation of Section 5

occurred. An election was held in June instead of November without having been precleared by the Justice Department. It is also true, as I earlier indicated, however, that that change from November to June was later cleared by the Justice Department after the fact of the election.

Plaintiffs content that even though the Justice Department has, in effect, approved the change in the dates of the election, we should continue to consider the effects of holding the election in June instead of November because a violation did occur and there may be equitable grounds for some relief as a result of that violation.

With respect to that violation, we deny any relief for the Section 5 violation as it relates to the election date change on grounds that reasons or bases for equitable relief have not been presented that are alleged to have caused an injury resulting from a violation of Section 5 which are independent of Section 2 or which are independent of the alleged constitutional violations. Thus, the issues that are relevant to any relief that the plaintiffs may be entitled to as a result of the violations of Section 5 will be treated and considered when we take up the alleged violations of Section 2. So we dismiss that Section 5 claim.

Second: Plaintiffs also allege that Section 5 of the Voting Rights Act has been violated because a change occurred when certain counties did not print the full text of the constitutional amendment on the ballots as is required by State law. We find, based on the Master's report, certain ballots in certain counties did not contain the full text of the proposed amendment, although the Mississippi state law required that the proposed constitutional amendment be printed in full on the ballot; but these alleged violations occurred, apparently, in counties where automatic or mechanical voting machines are used, and the text of the amendment was not printed over the lever that related to the constitutional amendment. Apparently, I suppose, there was no room to print the text in full; however, we do find that the full text of the constitutional amendment was posted in the polling places where this alleged violation occurred.

We also note that the witnesses from the Secretary of State's office testified that the amendment was printed and published in full in each of the daily and weekly papers in the counties and cities in the state of Mississippi. But in any event, we do not find

that these omissions constituted a change within Section 5, and we rely for that proposition on the rationale of *United States v. Saint Landry Parish*, 601 F.2d 859, which held that actions of State officials that are in conflict with the State's required procedures are not a change enacted or administered by the State within the meaning of Section 5, and therefore the subject matter of the failure to print the text on all of the ballots is not within the ambit of Section 5 of the Voting Rights Act.

The third Section 5 claim that the plaintiffs allege is that HCR 41 violated Section 5 of the Voting Rights Act in establishing five property tax classes and special tax treatment of nuclear plants in that it authorizes the legislature to withdraw the taxing authority from the county, and we dismiss that claim on the grounds that it does not state a standard practice, procedure, prerequisite or voting qualification under Section 5 of the Voting Rights Act.

Fourth: The plaintiffs have alleged that Section 5 of the Voting Rights Act was violated by the method of amendment that was utilized in this election, because more than one article of the Constitution was amended in a single amendment.

In the first place, we do not necessarily read the State Constitution to preclude what the State has done in this case; and in the second place, we hold that this, under the rationale of *United States v. Saint Landry Parish,* is not change that is within the meaning of Section 5 of the Voting Rights Act. We also note that it is a matter that has been litigated in the State Court and is primarily a matter of State law and not a concern of ours today.

Fifth: Plaintiffs allege that HCR 41 violates Section 5 of the Voting Rights Act in that it allows a simple majority rather than a two-thirds majority of the legislature to provide for taxation on nuclear plants. We dismiss this claim on grounds that it does not allege a change in a voting standard, practice, procedure, qualification or prerequisite within the meaning of Section 5 of the Voting Rights Act and does not come within the ambit of that statute.

Next let me turn to the constitutional issues that have been raised by the plaintiffs in this case.

The theories, as I understand them, and the pleadings and briefs and Complaints in this case are voluminous; and everything from

the bottom to the top has been alleged in this case, and it's kind of hard to keep it all straight; but as I understand it and as I'm able to gather from the briefs and the arguments of the parties and the evidence presented, the theory of a violation of the Constitution relates to the motivation of the legislature in enacting HCR 41 and HB 388, I believe it is—but in, anyway, enacting the laws that effected the shift of the tax dollars from Claiborne County.

The second theory is that HCR 41 property classifications are racially discriminatory because it has an impact that is more hard-felt on minorities and poor people than on whites; and third, as I understand the argument, not strongly pressed, the election date somehow violates the Fifteenth Amendment to the Constitution in that it abridged the rights of minorities to vote.

First with respect to the motivation of the legislature in passing this legislation, I will present what is my understanding, in brief, of the key points of the evidence that the plaintiffs and the defendants have adduced in this case with respect to the motivation of the legislature.

The plaintiffs' witness John Paul Markham, Jr., testified with respect to HCR 41 that blacks were discriminated in several respects with regard to the property classification proposed in that amendment. With respect to class one, single-family residences, he testified that whites got the benefit from this particular reduction, the supposed reduction in taxes, because their homes are more highly valued and because more whites own homes than blacks. With respect to class two, he testified that blacks were discriminated against because in taxing rental property, landlords usually passed the tax on to the renters and that blacks constitute a greater number of renters, proportionately, than do whites. And finally, with respect to class five, he testeified that the blacks were discriminated against by raising taxes on motor vehicles while reducing taxes on residences because there were proportionately more black owners of vehicles than black owners of residences.

Charles Shepphard, a member of the House of Representatives from Claiborne County, testified with respect to this legislation that he was told not to bring a whole bunch of blacks to the Capitol to demonstrate in favor of Claiborne County's position when the committee was considering the Grand Gulf bill in 1980;

and he consequently limited to 20 the number of citizens that he brought to that hearing.

It was further suggested in these committee hearings that Claiborne County was wasting its money and did not know how to manage its funds, and this was indicated by Representative Stubbs, according to the testimony of Representative Shepphard, when he noted that Claiborne County had come to a ball tournament in buses with stereo music. He also indicated, as evidence that the legislation was racially motivated, that Representative Williams had told him that if Claiborne County had been better managers of their money, they would have not had their revenues taken from them.

Representative Capps, in debate of HCR 41, according to Representative Shepphard, stated that Claiborne County could not manage its money properly; and finally, Representative Shepphard testified that Representative Wells stated that in one of the meetings, that HR 602, which is one of the earlier bills, was one of the ways that "we can get that money in Claiborne County."

Representative Shepphard further pointed out that the black caucus of the Mississippi legislature did not see Grand Gulf as a race-related bill during the early stages of Grand Gulf committee hearings; but they later began to see it as a racial issue, and this was particularly true at the time that the bill was passed, and that the conclusion of the black caucus that the bill was racially motivated was based on the debate on the floor with apparent references to the mismanagement of money and the lack of responsive government in Claiborne County.

He also testified that he overheard remarks during the course of final debates, apparently to asides, no one whom he could identify as having said, but such remarks as "those niggers in Claiborne County"; but as I've indicated, he could not identify who made those remarks.

And finally, the plaintiff, in its efforts to show that this legislation was racially motivated in the Mississippi state legislature, produced Representative Isaiah Fredericks, who is a representative from Harrison County. He testified by deposition that he thought that the legislature was trying to take money from a black county. This apparently was based upon, at least in part, Representative Meridith's statement that Claiborne County was

not capable of managing its affairs, a remark that Representative Fredericks considered to be racist.

Now I turn to the defendants' witnesses that relate to the motivation for this legislation.

The defendants put on Wesley F. Busbee as an expert on the legislative history of HCR 41 and HB 388, particularly as to what motivated the legislature to pass this legislation. He concluded that the legislative history showed that money and how it was to be distributed was the motivating force and factor behind all votes that were taken on the bills and that race was not the motivating factor in the votes taken on these bills. Furthermore, he testified that in his opinion the results and effects of the bills would not be racial because he contended that the revenues would go to the poorest and blackest counties in Mississippi.

Representative Horace Meridith testified that his committee conducted many hearings over the years on the question of tax revenues from Grand Gulf; that one of the purposes of his committee was to determine what the needs of Claiborne County were, especially in view of the fact that it was a county that had gone from a 600 thousand dollar per annum budget before Grand Gulf to a multi-million-dollar budget since tax revenues on Grand Gulf had been collected. It was important to his committee to determine exactly what the needs of Claiborne County were in the light of its debt situation and in the light of its future needs and considering, in particular, that it had become accustomed to a considerably greater income than it had had before Grand Gulf. He said that at no time did his committee ever get a direct response from Claiborne County, even though they repeatedly requested that Claiborne County testify before his committee as to what their needs were.

This was later admitted by the supervisor from Claiborne County, Mr. Butler, who testified that no one from the Board of Supervisors would go to Jackon to testify officially before the legislature because it would have been political suicide to have done so. It was as if the person who testified was agreeing to the death warrant for these funds, and this he acknowledged that no response was ever made to any efforts of the legislature to get any official testimony regarding the needs of Claiborne County. They simply did not respond to any of the legislature's requests.

Representative Meridith admitted that he made a statement to the effect that "they don't have any government in Claiborne County," but he said that because he was frustrated because he could not get any information from the county on any occasion. He said his derogatory remarks about Claiborne County had absolutely nothing to do with race and that he told representatives of Claiborne County and citizens of Claiborne County that the issue was not black, it was not white, it was green.

He further explained that there were several reasons why all utility plants were not treated the same as Grand Gulf. First he said the Tax Commission had advised his committee that they could not figure out how it could be done. Additionally, and perhaps most important, was the political problem. If, according to Representative Meridith, you had 20 plants in the state that you were trying to bring within the purview of this constitutional amendment proposed by HCR 41, representatives of 20 counties would organize opposition and beat the entire plan. If you chose one or two counties that had the nuclear plants and the larger taxable structures, the political opposition in the legislature to depriving two counties of those revenues would be far less than if the revenues of 20 counties were going to be hurt.

He pointed out that Claiborne County was indeed not the only county that the legislature had considered for sharing of its tax revenues with the rest of the state. Tishomingo County had been designated for the construction of a nuclear facility by TVA, and the legislative efforts at one point involved both Tishomingo and Claiborne Counties, the only two counties that were locations for nuclear plants.

As far as Claiborne County is concerned, another motive of the legislature, according to Representative Meridith, was that there was a tax base of up to 25 million dollars in a small county. He testified that simply something needed to be done.

Jay Disharoon was the senator who represented Claiborne County and who fought for many years the legislation that was finally enacted. Senator Disharoon, who is white, testified that he fought the Grand Gulf bill for years and years and that he was always able to beat it down until the final law was passed; but in 1986, he said, there was a mood change in the legislature. Property taxes had gone up statewide as a result of reappraisal pursuant to the 1982 amendment to Section 112 of the Mississippi

Constitution, and it had to be re-amended in order to respond to the cry for tax relief. Others in the legislature in the service area of MP&L saw this as a means of reducing taxes in their counties—other legislators did.

Furthermore, Senator Disharoon noted that Claiborne County was not united in its opposition to the bill when it was in the legislature. The City of Port Gibson, for instance, which is the county seat of Claiborne County, was deriving no revenues from Grand Gulf; and it wanted some revenues, and it wanted the bills, HCR 41 and HB 388 to pass. Indeed, the mayor of Port Gibson, the county seat of Claiborne County, lobbied for the passage of the bills.

According to Senator Disharoon's testimony, the Yellow Creek Nuclear Plant in Tishomingo County came up two years before the bill came up with respect to Grand Gulf; and this particular bill relating to the Yellow Creek facility proposed taking money away from Tishomingo County that the county was to derive from taxing the Yellow Creek facility, and to build bridges with that money over the Tenn-Tom Waterway. The bill was passed and enacted into law, according to his testimony.

Next, Steve Wells, a former representative from Lincoln County, testified that although he was involved in offering substitutes for the bills that ultimately passed and was involved in various legislation and amendments with respect to the final legislation, no amendment or any other act on his part was motivated because Grand Gulf was located in a black majority county.

Charlie Williams, representative from Tate County and one of the floor managers of HCR 41, testified that HCR 41 resulted from fine tuning similar legislation over several years, including consideration of taxing all utilities and legislation taxing the Yellow Creek nuclear facility, as well as other amendments and considerations that never entered into any bill, and not into the final bill. He said that motivation for the bill was the tremendous inequity that existed with respect to the Grand Gulf facility because of the extremely high assessment; that is was fair to return money to local districts that were bearing the costs of Grand Gulf and that HCR 41 and HB 388 were the final bills after much consideration.

Furthermore, he said that the other MP&L plants were up to

20 to 25 years old and that MP&L had no plans to refurbish those plants. They, therefore, would be out of service; and this was one of the reasons that the focus turned on Grand Gulf, because Mississippi Power & Light would be getting most of its electricity and the ratepayers in the service area would be paying for most of their electricity from Grand Gulf.

Representative Williams further testified that the election was held in June to provide immediate relief to the homeowners that would benefit from the reclassification of the provisions of HCR 41. If the election had been postponed until November, according to his testimony, it would have been impossible to prepare and submit tax roles and make relief available to the taxpayers for the 1987 taxable year. He further noted that there was no objection by anyone in the legislature to the election being held in June instead of November. He further testified that Claiborne County had never given an accounting of where the 75 million dollars in tax revenues that they had collected from Grand Gulf in the past had been spent.

Senator C. R. Montgomery of Madison County. chairman of the Finance Committee of the Mississippi State Senate, stated that as far as he was concerned, the reason for the Grand Gulf legislation was to provide some relief for the ratepayers of MP&L in 45 counties. A second consideration in passing the legislation was to be fair to Claiborne County by providing them a significantly higher proportion of the revenue than any other county.

Senator Nevin Sledge from Bolivar County testified by deposition that the purpose for voting in June was to give homeowners relief for 1987.

Senator John Keaton of Grenada County testified by deposition that the reason he supported the legislation was because he felt like the ratepayers should benefit, and his three counties were in the service area of MP&L. The reason that Grand Gulf was singled out and other utility planys excluded was because Grand Gulf produced so much more money than the others and because of the political opposition in the counties where the other utilities are located.

Senator Robert G. Huggins testified by way of deposition that the difference between Grand Gulf and other generating plants was the enormous amount of money involved.

Representative Terrell Stubbs of Simpson County testified that it took some 11 years to convince the people in the legislature to redistribute the tax dollars provided by Grand Gulf, and it was done because it was simply not fair to the other rate-paying counties to have Claiborne County the beneficiary of all the tax dollars. He testified that race had nothing to do with the passage of the legislation. He noted that two black members of the Ways and Means Committee were actually the authors or at least two or the authors of the Grand Gulf legislation that is HCR 41. There was later testimony that indicated that each committee member's name was put on the legislation and that if anybody wanted his name taken off, he would ask for his name to be taken off; and no one stood up to have his name taken off this legislation.

He further testified to efforts to assure that Claiborne County would not be left with the same tax base that it had before Grand Gulf was constructed. He said the legislators took into account the fact that Grand Gulf had been providing additional revenues and that Claiborne County had become somewhat accustomed to a higher tax base than it had had earlier.

So that is the evidence that was presented, both by the plaintiffs and the defendants. You can obviously tell from the tone of the testimony of the respective parties that the plaintiffs introduced evidence that tended to show that the Mississippi legislature was motivated by race when they enacted Grand Gulf, and the defendants put on evidence that it was economically motivated.

So what is our conclusion from this evidence that I have noted and from other evidence that we heard and from the witnesses that we observed?

One, it is clear to us that Claiborne County did not cooperate with the legislature in conducting the hearings on Grand Gulf, for whatever reasons. We're not faulting Claiborne County for that. But it is clear that the legislature made attempt after attempt after attempt to get somebody from Claiborne County government to testify in behalf of Claiborne County as to what their needs were and how their needs could be provided for in the event of the redistribution of the tax dollars from Grand Gulf, and they heard nothing from Claiborne County. According to the testimony, no one was willing to speak for Claiborne County.

Thus, as far as the primary evidence the plaintiffs introduced to show that the legislation was racially motivated—that is, the

comments that there was no government in Claiborne County, that their funds were mismanaged, we find has a factual basis unrelated to race. There was evidence that the funds that Claiborne County was misspending some of their money, and there was no evidence that was introduced by Claiborne County that would refute the inferences that we could draw from that evidence.

Thus, it seems to us that the remarks that Representative Meridith made and that other representatives are alleged to have made about the mismannagement had a reasonable factual basis and was prompted by frustration in dealing with Claiborne County, which refused to deal with the legislature.

Now, as far as Representative Shepphard is concerned, we feel that he was a truthful witness. We do not doubt his testimony that he overheard some persons during the course of the debate refer to "those niggers in Claiborne County"; but he could not identify any person who made those remarks, and it is the finding of the three judges that there is no evidence that those remarks were pervasive.

The evidence is overwhelming that the motivation of the legislature for a number of years was economic. We find that the economic reasons are fully supported in the testimony that you have heard. It is clear that there were valid economic reasons and motivations for the legislation.

Grand Gulf indeed is the only nuclear plant in the state of Mississippi. It is the only plant that produces the kind of income from its tax revenues in the state of Mississippi. The political and practical problems for not including other utilities constituted a reasonable explanation, as far as this court is concerned, as to why other utilities were not included. They obviously were much smaller. They obviously would not produce the tax revenues. They obviously were not as controversial as the rate burden that Grand Gulf was imposing, and they were obviously old plants that were being phased out, at least in part.

Furthermore, it is clear to us that Claiborne County was not necessarily singled out simply because it was Claiborne County or simply because it had a black government or any similar reason at all, because we find that Yellow Creek in Tishomingo County was also the subject of similar legislation; and we can take judicial notice of the fact that Tishomingo County is a predominately

white county.

Finally, we are convinced that there was a totally rational basis to conclude that it was fair to the other 44 counties in Mississippi Power & Light's service district to allow them to share in some of the tax revenues from the structure and property that they themselves were supporting.

With respect to HCR 41 and the property classifications that are alleged to have a racial impact against blacks, we find first that there was no racial motivation for reclassification. Indeed, I don't think that the plaintiffs have contended that. Certainly there has been no evidence that was adduced that related to racial motivation behind reclassification of the property. We find that there was a rational basis for the reclassification because of the political pressure of the residential homeowners who seemed to have been pounding on the legislators' doors. Certainly we find that the law is neutral on its face; and as far as its impact is concerned, we find that debatable at best.

In any event, in order for us to find that this legislation was unconstitutional, we must find that it was purposefully discriminatory and that there was an intent to discriminate, either in the terms of the bill or in the motivation for enactment of the bill; and neither can we find.

With respect to the election date and whether it violates the Fifteenth Amendment of the Constitution in denying access of voters, we find that there was no—and this is quite apart, now, from the Voting Rights conclusions that we later draw; but as far as violating the Contitution, the election date in June instead of November did not deny equal access of the polls within the constitutional sense to black persons. The evidence showed, depending upon whose statistics we accepted, that the black turnout was exactly equal to the white turnout in the June election or that it was a third greater than the white turnout.

And finally, with respect to setting the election date, we find that there was no intentional discrimination on the part of the legislature to discriminate against black people by setting the election in June; indeed, there was a rational basis for a June election; and as a matter of constitutional law, if we cannot find intent to discriminate in setting that date, then there are no constitutional violations or implications.

Thus, with respect to all of the constitutional issues that are

raised, we conclude and we find that there was no racial motivation with respect to the enactment of any of the legislation; we find that there was no intentional discrimination with respect to any of the legislation; we do not find that there is conclusive evidence with respect to the impact of the legislation; and finally, as a matter of law, and on an alternative ground, we find that the constitutional claims are barred by the tax anti-injunction statute.

The Tax Injunction Act reads as follows: "The district courts—" and that's what we are sitting as, a district court "—shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state."

The United States Court of Appeals for the Fifth Circuit has held that the Tax Injunction Act bars any actions that are brought pursuant to 42 U.S.C. 1983, under which the constitutional claims in this case have been brought, and that it applies to the general administration of a taxing scheme of a state; and we find that the Tax Injunction Act is specifically broad enough to cover the particular act in question here and that notwithstanding the other grounds that we have decided the constitutional issues on, that the Tax Injunction Act bars this court rendering any relief with respect to the constitutional issues. The cases we rely on are *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972) and *United Gas Pipe Line Co. v Whitman*, 595 F.2d 323 (5th Cir. 1979).

Just in the event that the record is not clear—As I've indicated, I'm just talking from some notes here, and I may or may not have omitted this; but in the event that I did, this court makes a specific finding with respect to the setting of the June 3rd election date that it served a valid and rational legislative purpose—that is, to allow the taxpayers of Mississippi to receive the benefit of any tax reduction that resulted from that Act in the 1987 year and not have the taxpayers to wait an additional year in order to receive the tax benefits. We specifically find that there is no evidence that the setting of the date of the election was racially motivated; and with respect to HCR 41 and HB 388, we specifically find that its enactment was motivated by economic considerations and not by racial considerations.

We turn now to what we really consider to be the crux of this

case, and that is the alleged violation of Section 2 of the Voting Rights Act.

Section 2 of the Voting Rights Act provides that no voting qualification, or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any state, which results in the denial or abridgement of the right of any citizen of the United States to vote on account of race. Subsection b of this statute goes on to provide that a violation is established if it is shown that the political processes leading to an election are not equally open to participation by members of a class of citizens protected by this statute in that its members have less opportunity tha other members of the electorate to participate in the political process and to elect representatives of their choice.

Now, the way we understand the plaintiff's theory that Section 2 of the Voting Rights Act was violated by holding the election in June instead of November is this: Holding the election in June instead of November was a voting procedure applied by the State that shortened the campaign period, constituting an abridegement of black persons' right to vote because it denied them equal access to information and hence denied black persons the right to cast an informed vote on the same basis as other members of the electorate.

This theory is the plaintiffs' basis for the Section 2 aspect of this lawsuit and is supported by the allegations that black persons are less educated, are less politically sophisticated and enjoy substantially less means and methods of communicating with its constituency than do whites. These deficiencies are alleged to have resulted from years of discrimination in education and voting.

In determining whether these plaintiffs have proved a violation of Section 2, we have three considerations before us today. The first is whether these plaintiffs have standing. The second is whether the theory propounded by the plaintiffs in this case is a cognizable cause of action under Section 2. And finally the question we have before us today is whether the theory is supported by the evidence in this case.

It is, of course, fundamental that in order for anybody to bring a lawsuit in a Federal district court, they must have standing within the meaning of Article III of the Constitution of the United States. There must be an actual case or controversy. We are not here to litigate just simply because someone has a question that

they may think is interesting or a grievance that they want to litigate or a question that they may be tangentially involved in. We are here to litigate actual cases or controversies, and that's all we can litigate by virtue of the Constitution of the United States. The Constitution does not permit us to entertain any kind of case that does not fall within the provisions of the case or controversy requirements of Article III of the Constitution.

In determining whether we have that standing today and whether these plaintiffs here can litigate the question that they are attempting to litigate, we first have to determine what standard we are going to apply. First, as I've indicated, the plaintiffs must meet the bare minimum standard. Now, if they meet the bare minimum standard, that does not automatically mean that they have standing to pursue this particular litigation, because even if we decide that there are basic constitutional requirements for standing, we then have to determine whether, as a matter of prudential concern, this is the place to litigate the kind of issues that are being raised by the parties.

Obviously the plaintiffs here fare a lot better if we apply just the bare minimum requirements, and that is exactly what we have determined is applicable in this case. Here a voting right is concerned; and when a voting right is concerned, we are bound, we think, by the U.S. Court of Appeals for the Fifth Circuit in *O'Hair v. White*, 675 F.2d 680 (5th Cir. 1982) (en banc), that held that "we do not believe that prudential notions of self restraint in the area of standing are properly invoked in cases involving dilution of an individual's fundamental voting rights." We translate that holding to this case as meaning that because voting rights under Federal statutes are alleged here, this controversy is the businsess of this court; a voting rights case is the kind of case that is most appropriate to be litigated in this court, and we only require the plaintiffs to make a minimum showing.

So what do they have to show here in order to meet that standing? First they've got to show that an actual injury occurred to them, to these individual plaintiffs. First they've got to show that that injury can be fairly traced to the challenged action; and finally, they've got to show that the injury they complain of is likely to be redressed by a favorable decision of this court.

I say at the outset that our analysis of the facts that are alleged

in this case with that law indicate that this is a very, very close question. We have grave doubts about standing one way or the other.

First, we look at the Complaint; and here, facts that would support standing for the plaintiffs are not alleged. For instance, it is clear here that the claim that they are making is that black citizens were denied equal access to information and therefore did not fully participate in the electoral process. Not a single one of the plaintiffs here allege that that injury occurred to them. Not a single one of the plaintiffs say that they were denied access or that they did not cast a fully informed vote. They are in effect seeking, in that respect, to advance rights of third parties and not breaches of their own rights. So the Complaint itself does not allege those facts from which we can determine whether the plaintiffs have alleged an injury under Section 2 of the Voting Rights Act that entitles them to bring this lawsuit.

We also know that it is not appropriate to determine standing on the basis of a fully litigated case to see whether the plaintiffs prevail or don't prevail. So we have looked to allegations of facts that were adduced primarily in some depositions and affidavits that were filed in connection with earlier pretrial motions for summary judgment and other related motions and motions to strike, and that sort of thing, to determine whether the plaintiffs have successfully alleged an injury sufficient to entitle them to bring this lawsuit under Article III of the Constitution

The way we understand the plaintiffs' contentions in this regard is they've suffered two injuries. First, they say that we have suffered a real injury by virtue of saying that we are citizens of Claiborne County, we are taxpaying citizens of Claiborne County, business owners in Claiborne County, homeowners in Claiborne County. As a result of the action that we complain of—that is, black persons being denied full information because of the shortened campaign period—because that occurred, we have lost a significant part of our tax base in this county, and that is a real injury; and that, to us, seems to be a real injury.

The second injury that the plaintiffs allege or seem to allege is that they were injured because they did not have an adequate opportunity to present their point of view to their constituency and the people that would have been sympathetic to them because of the shortened campaign period; and that argument is an injury,

though obviously a bit more tenuous.

But the next consideration that we have: Is the injury of economic harm fairly traceable to the challenged conduct, that is, to the fact that the campaign period was short? Well, that is less sure than the injury in fact; but they contend: We lost the election because the short campaign precluded us from effectively reaching our voters; the lost election is the cause of economic harm. Though the relation between the injury and the challenged conduct is uncertain, we will give the plaintiffs the benefit of our doubt.

But then we get to the question of whether this court can redress the injury that they complain of; and clearly, we cannot redress the injury that they complain of; losing the election, and the loss of tax base in Claiborne County. The only thing that this court can do is to order a new election to give them ample time to campaign. So as far as the injury of economic harm is concerned, it would seems to us rather clear that they don't have standing, because we cannot change the results of the election for them. We can simply give them another new election, and whether they might win is far too speculative under the case law to constitute a basis for redressing this particular injury.

Now let us turn to the second injury that is implicitly, if not explicitly alleged, that is, the denial of the opportunity to effectively communicate with black voters. We have trouble finding the injury sufficient to support standing. It is certainly not an injury of a right protected by Section 2 of the Voting Rights Act which is a guarantee of the rights of voters; it does not guarantee the rights of those seeking to reach voters, except indirectly. Furthermore, the plaintiffs have hardly alleged any facts to support their conclusory language of injury, that is the denial of an opportunity to communicate with black voters.

Nevertheless, assuming the injury in fact, it is plausibly alleged to be fairly traceable to the challenged conduct, that is, the shortened campaign period. And finally, we could, of course, redress the injury of lack of opportunity to effectively communicate with the black constituency, because we can set aside the election and order a new election that would give you an ample period of time in which to campaign.

So you can see that either one of these bases for standing, whenever it's analyzed in terms of the injury itself, whether it

is fairly traceable to the challenged conduct and whether we're able to address it, is awfully thin; and we have, as I've earlier indicated, grave doubts and reservations about whether the plaintiffs have standing; and it could be very likely, if this case is appealed by either party, that it would be reversed on that basis, that is, that the plaintiffs don't have standing, because we do today hold that the plaintiffs have standing; and we do so because when we consider the totality of all the facts and arguments, we think that we have alleged before us an actual controversy. We are not talking about, as has been said, some rarifed argument in some debating society. We're talking about facts, certainly allegations of facts, that occurred that injured people; and even though the relationship between those facts and the challenged conduct and our ability to remedy the injury may be tenuous, there seems to be no questions that whenever we consider the totality of the circumstances, we have got an actual controversy in this court and that we may be able to provide relief.

Thus, holding that the plaintiffs have standing in this case, we approach the next question; and that is whether the theory that they advance is cognizable—that is, does the Voting Rights Act recognize as a violation of its provisions the denial of equal access to information.

The position of this court is that while there is no guarantee under the Voting Rights Act to any voter that he has the right to cast an informed vote, it can be a violation of Section 2, given the appropriate circumstances, for the State to apply a procedure that has the effect of precluding an informed vote by black voters when that procedure does not have the same effect on other voters of the electorate.

Thus, the final question that is presented here today is this: Does the evidence demonstrate that the shortened election period resulted in the denial to black voters an informed vote on HCR 41 equal to other members of the electorate?

Let's turn now and review the evidence as relates to the Section 2 violations.

The plaintiffs' witnesses included Allen J. Lichtman, who was offered as an expert in ecological regression; and he testified, as a matter of fact, that more blacks voted for HCR 41 than did whites. He testified that the statistical analysis, however, supports the conclusion that there was a lack of black informed vote when

compared to the white vote. This conclusion is based on the fact that the blacks in MP&L's service area did not support to any greater extent HCR 41 than did blacks in other parts of the state. The whites, however, in MP&L's service area voted for HCR 41 in greater percentages than whites outside the MP&L service area, which obviously means that white people tended to vote their interests more than the black people voted their interests in the MP&L service care and as regards the vote statewide. He concluded that one of the reasons that blacks voted a less informed or a less self interest was bacause of the insufficient time to be informed.

We next turn to the testimony of Albert Butler, who is the supervisor from District One of Claiborne County. He testified that he learned in April that HCR 41 and House Bill 388 had passed and he knew that an election would occur in June. He testified that there was a great deal of confusion among the Claiborne County Board of Supervisors as to what to do. They finally hired a law firm to try to "keep the vote from going on the June ballot." This occurred in May.

He testified that he went to the local NAACP in Claiborne County but ran into difficulty in trying to convince them to oppose HCR 41. He said that he didn't know how to get the point over to them to convince them to vote against te bill that would divide the revenues of Grand Gulf, even when he was talking to the citizens of Claiborne County, who would be harmed most by this legislation and this constitutional amendment. He said that he went to local black ministers, who said that they would help him as best they could; but they "did not understand." He further testified as to the disastrous consequences that would occur to Claiborne County as a result of reducing the 13.5 million to eight million for the next few years and then to less than that later on.

Supervisor Butler testified that he knew Grand Gulf was a topic in the legislature ever since he had been on the Board of Supervisors—that is, January 1984; and he knew that the county had hired Mr. Mason and Mr. Levanway to lobby on the subject. A committee called Concerned Citizens for Fair Taxation has been formed in Claiborne County, and the supervisors were members of the board. Concerned Citizens was the employer of Mr. Shelby and Mr. Levanway, who had been hired in February

of 1985.

In February of 1986 the board hired another attorney to try to find a legal argument to try to block the election that they knew would be coming up soon. He admitted that the Board collectively did nothing to campaign against this constitutional amendment. Individually, he said, "we did a little something."

Supervisor Butler agreed that he had time to call supervisors all over this state but that he only talked to Bennie Thompson and Robert Walker and Mr. Brooks of Lowndes County. He testified that he did not follow up with any of these supervisors. He said that the problem that he had was on the local level, meaning in Claiborne County; that people were mad at him for what he was doing and some were spreading it on him that he was against something that would help the local people. These quotes come from my notes of Mr. Butler's testimony: "We were not unified locally." "We could not ask others to help us when we had a problem at home." "Claiborne County knew it didn't want its money divided. We couldn't agree on how to oppose it, though."

He further testified that he personally was controversial at the time because he was opposing the bond issue and that half of the community was against him. This stymied his effectiveness and his ability in the local community and his willingness to campaign against HCR 41. He said that with respect to HCR 41, there was little he could say.

Supervisor Butler testified that the Board of Supervisors had reconsiled itself to the fact that it could not win the fight, that the time had come when they were going to take the ad valorem taxes and that the Board could not stop it. The Board, therefore, according to a member of the Board of Supervisors, concluded that it was best to fight it out in court because we could not win the election; and therefore, no campaign of any kind, in the media, personal or otherwise, was undertaken to defeat HCR 41. And, of course, Mr. Butler is the witness who testified, as I've earlier indicated, that no one ever showed up at the legislature because to have gone there and testified would have been political death; so no one went when they were summoned, and no one responded to the summons.

He further testified in connection with the campaign period that he found many blacks in other counties who wanted the

benefit that their county would receive from the tax revenues of Grand Gulf. He reported that other black citizens in other counties told him in connection with this election, "We need some money in our county too. It's wrong to take your money, but we need the money ourselves."

This witness concluded by saying that "if we could have mounted the right type of campaign, we could have won, maybe; but we had to be unified to do it, and we simply weren't unified."

Leroy Brooks testified by deposition that if Claiborne County had asked him to oppose the amendment because it was unfair to them, he probably would have done so; but Mr. Brooks, who apparently is a leader among the black supervisors in the Mississippi Supervisors Association, testified that he was never asked by anybody in Claiborne County, on the Board of Supervisors or anybody else, to help or assist them in opposing HCR 41.

Leroy Brooks, the supervisor, testified, as a matter of fact, that he couldn't even remember how he had voted on the bill, because his primary interest was the ethics resolution, the conflict of interest amendment, and that as far as Grand Gulf was concerned, it was an isolated situation to him. He also testified that no one ever contacted him in connection with the black asociation of supervisors, and it was never discussed, but that he could have called a meeting before the June election if they had wanted to, but nobody ever asked him to call a meeting.

Next we consider the testimony of Dr. Leslie McLemore. He testified that blacks have less effective organizations to communicate with voters than are generally found in the establishment or in the white community. He testified that the black campaign is more on a person-to-person basis—that is, church, civic organizations and so on. He testified that black campaigns are grossly underfunded. He further testified that black churches are generally the focus of and the foundation of a campaign and that sororities and fraternities, voter leagues and the NAACP also constitute part of the black political network. In the white community, counter to those means of communication, he noted that the white organizations included such organizations as Farm Bureau, Mississippi Economic Council, Mississippi Manufacturers Association and so on, and the blacks did not have any sort of comparable organizations as

those.

He testified to the limited experience that blacks have on constitutional referenda. His expert opinion was that the June election limited the time for blacks to be informed because the mechanics are not in place for a statewide network of communications. Furthermore, he testified that it takes longer to intelligently inform black voters because of the lack of this network.

On cross-examination Dr. McLemore stated that he never been contacted for help or assistance in the election to oppose HCR 41.

Ray McGrath was called as a witness. He's an employee in the Ad Valorem Division of the State Tax Commission, and he testified to the effect that the bill was complicated and confusing, with inconsistent interpretations as to provisions. His testimony, however, related primarily to the property classification provisions of the bill.

Finally, Stone Barefield, attorney for the Board of Supervisors in Forrest County, testified as to the confusion and contradictory effect of the bill, testifying that in his county it had had the opposite effect that was intended—that is, that taxes on most private residences were actually raised instead of lowered. He did testify, however, that the legislature did not knowingly do what they did.

The defendants' testimony on Section 2, as far as I was able to categorize the witnesses' testimony, was limited simply to one witness, Dr. Harold Stanley; and he was presented as the State's expert on ecological regression analysis. He testified that his analysis showed that there was not a tight relationship with respect to race concerning HCR 41. His analysis also showed greater differences in the white vote than in the black vote when comparing the vote outside MP&L's service area, suggesting that whites voted their self interest slightly greater than did blacks. He could draw no conclusions from the statistics, however. He concluded, in his expert opinion, that he could not tell why blacks voted the way they did and his testimony cast doubt upon the calculations, projections and expert opinion of the plaintiffs' expert witness on ecological regression that the evidence showed that the black vote was less informed than the white vote.

According to his testimony, in November about 40 percent of the blacks turned out and about 26 percent of the whites turned

out. In other words, considerably more blacks turned out than whites, according to his analysis. And in June, according to his figures, though he testified within ranges, approximately 11 percent of the whites turned out and 19 percent of the blacks turned out in the June election.

I turn now to the analysis that the three-judge court places on the evidence that you've just heard in the light of the applicable law.

With respect to the expert statisticians, we, of course, were impressed by both of these gentlemen. They testified with confidence; they testified and demonstrated an in-depth knowledge of their field; and they looked at, to a large extent, the same data, though the State's witness data was slightly more complete.

In any event, as far as this three-judge court was concerned, it was a standoff. We simply respected the testimony of each but did not feel that one witness's testimony carried a greater preponderance of convincing weight than the other. Thus, for the purpose of our analysis, we look to the other witnesses.

First, this court does not accept the conclusion that the black network of political communication is ineffective or that the ability to understand issues or the inability to understand issues exists in any greater degree with blacks than with whites as a class. We recognize that blacks as a class have lower education levels. We recognize that as a class blacks have less sophistication in politics because they have been excluded from politics throughout the history of this state until recently—with the exception of the period of Reconstruction until 1890 or so. But we do not accept that blacks as a class are less intelligent; and that, apparently, is what some of the experts were suggesting. We do not accept that blacks are less intelligent as a class than whites; and to the extent the experts were saying that is part of the reason it takes longer to educate a black voter than a white voter, we don't accept it.

We do accept that blacks as a class are underfunded and that this is a barrier to one means of communication, that of media; but in this campaign we observed there was no evidence of any media campaign and no evidence of any efforts on the part of the blacks or the whites to wage any extensive media campaign where funds would have been a primary consideration.

We do note that in this case, in this particular case, that the black plaintiffs were not an underfunded class, as blacks often are in elections, because the plaintiffs in this case had access to millions of dollars in tax money. Even though there were obviously other obligations for the tax dollars, there was money that could be reached to even engage in a media campaign if it had sought to do so. It chose to spend the money on lawyers instead, perhaps a wiser investment.

The evidence in this case shows that if blacks were denied access to information, it is because the plaintiffs and their group did not offer the information. There was no effort on the part of the plaintiffs in this case to communicate with their black constituency, if the blacks in the state were their constituency.

Dr. McLemore, a recognized political expert in black politics in Mississisppi and someone who could have given wise advice and counsel, was never contacted. Supervisor Brooks, a leader among the black supervisors who could have martialed his fellow black supervisors in various parts of the state, was never contacted. There was no evidence of any followup with Bennie Thompson and Robert Walker.

The supervisors in Claiborne County made a deliberate choice not to campaign. They testified to that. That's exactly what Mr. Butler testified from the witness stand. He noted that there was division in the ranks. Nobody knew exactly how they wanted to approach the campaign. He stated that the supervisors, in effect, recognized their fate; that the time had come and the reckoning day had come that the State was going to take away the tax base of Grand Gulf; and, according to his own testimony, "we decided there was nothing we could do about it."

Indeed, the testimony from this witness stand was that their fellow black citizens in other counties told them, whenever they did make some effort to campaign, "We don't think it's fair for the money to be taken away from you, but we need the money." So what little effort was made to campaign met with little success.

We're not faulting the Board of Supervisors of Claiborne County for their decision not to campaign. They recognized that a campaign under these circumstances was not going to make any impression on people because people were going to vote their self interest. That was the word that had come back to them.

And finally, the fact that there was no evidence of denial of

opportunity to inform black voters, except such as was self-imposed, is demonstrated by the testimony that a deliberate decision had been made not to campaign and that the deliberate decision had been made to litigate rather than campaign.

Next, in considering the contentions of the plaintiffs, plaintiffs contending that they have been harmed because the black voters were denied access to information by the shortened campaign period, we note that the plaintiffs had known for several years that they had a problem. They had known for several years that the legislature had plans to take away the tax structure of Grand Gulf and to share those revenues with the rest of the service area. Yet, the evidence shows little or no effort to educate any voters, black or white. Furthermore, the evidence showed here that the plaintiffs in this case specifically knew when an election was going to occur two months before it occurred, yet no campaign plans were ever made.

With respect to the contention that if the election had been held in November instead of June they would have had a greater period of time to campaign and to communicate their point of view and to make other blacks in Mississippi understand how they felt, we find that that is totally speculative in view of the absence of any efforts that were made in the campaign period. There is no evidence presented to us that there would have been any campaign that would have been waged by the plaintiffs in this case if the campaign had even been longer; and thus holding the election in June instead of November did not, as a matter of fact, deny any black voters access to information.

With respect to the contention of the plaintiffs that the annual supervisors' meeting occurred in July and, if the election had been in could have gone back to their respective counties and explained Claiborne County's point of view to the black citizens of other counties, we find that such a conclusion is only conjecture because we have the testimony of supervisor Brooks who said that he could have called a black supervisors' meeting, that he would have tried to help his fellow supervisors in Claiborne County if they had asked for his help. There was no request for help. Indeed, Supervisor Butler testified that he ran into Brooks at Jackson State at a meeting at a group where black supervisors were and that he talked with Brooks at some length and never mentioned the campaign against HCR 41.

Thus, with respect to the contention that a longer campaign period would have provided black voters greater access to information, there is no evidence before us that this is so. The evidence before us is to the contrary, and any argument that it would have occurred is speculative.

Finally, with respect to the contention of the plaintiffs that black voters were denied equal access to information because HCR 41 had the opposite effect of what it was represented to achieve—that is, the people were told that it would reduce taxes for residences, when in fact in some instances, and especially with poorer persons or people with less valuable houses, it actually raised taxes—we find that as far as that is concerned, that any misrepresentation, if it occurred, was unintentional as far as the legislature is concerned; and we also note that the information went to both black and white constituencies; and even though it may have been misinformation, it was not denial of equal access to blacks. If it was denial of equal access, which we do not pass on, it was denial of accurate information to all voters, not simply black voters.

And finally, we are convinced that there was no denial of equal access to the political process in this case, because the evidence indicates that the black voter turnout was equal to if not greater than the white turnout in the June election.

So this three-judge court holds that the evidence does not support the conclusion that the shortened election had the effect of denying access of information to black voters so that blacks as a class cast a less informed vote in the political process than did other members of the electorate.

In conclusion we would make some general observations, just the observation of three judges who heard all the testimony in this case, who have plowed through tons, it seems like, of paper, who have studied depositions, and who have conferred on several occas ons among ourselves. Our conclusion about this case was probably summed up best by Mr. Meridith when he testified that he told Mr. Evan Doss, the Tax Assessor for Claiborne County, that "the issue is not black; it's not white; it's green." That is the way it appears to this court: that here we don't have persons acting because of black skins, or persons acting because of white skins; we have persons acting because of human qualities common to all. That is, that Grand Gulf was located perchance in

Claiborne County, although it was being paid for by the citizens in 44 other counties. It wound up costing the utility users in all 45 counties many, many dollars, wound up costing in the billions of dollars to construct, a burden that was going to have to be shared by citizens in 45 counties. Those 44 counties looked around and saw that one county was getting all of the benefit for the burden that 44 more counties were bearing. And as I say, a human quality emerged: They wanted the benefit if they were going to bear the burden, and they looked at Claiborne County, which was solely enjoying the benefit; and when they looked to Claiborne County, they thought it was a matter of fairness that Claiborne County should share Grand Gulf's tax dollars with the people that were bearing the burden of the cost. They put pressure on the legislators to do something about it, to relieve their taxes and to get some of that tax money for their counties; and the legislators went into action.

Claiborne County is a county of about 12,000 souls; and unfortunately, it neither has the political clout nor, in this case, the equity of argument to overcome the demands of the rest of the counties. The Board of Supervisors were exactly right in this case. They saw it coming; and they acknowledged that they couldn't stop it, even if they did campaign. They recognized that the day or reckoning had come when Claiborne County was going to have to share its revenues from Grand Gulf. And from we three judges, our observation is that, under the same circumstances, it would have happened to any county and certainly to any small county who could not force the legislature as a matter of clout or who could not cajole the voters as a matter of equity.

A judgment will be entered in accordance with this opinion. Court is adjourned.

## CERTIFICATE

I, CAROL R. WINSTEAD, Official Court Reporter for the United States District Court, Southern District of Mississippi, hereby certify that this is a true and correct transcript of the Opinion rendered in this action, such transcript having been prepared to the best of my skill and ability.

I further certify that the page format used and the transcript

fees charged are in accordance with rules of the Judicial Conference of the United States and this court.

This the 22nd day of December, 1986.

Carol R. Winstead

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
Jackson Division

—

**CIVIL ACTION NO. J86-0373(L)**

—

**EDDIE BURRELL, ET AL.**
***PLAINTIFF***

*v.*

—

**WILLIAM A. ALLAIN, ET AL.**
**DEFENDANTS.**

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## JUDGMENT

In accordance with the Opinion of the Court rendered on December 18, 1986, Judgment is hereby entered in favor of all defendants and against plaintiffs, and this cause is finally dismissed with prejudice.

Costs of this action are taxed against plaintiffs.

SO ORDERED, this the 31st day of December 1986.

E. Grady Jolly, Jr.
UNITED STATES
CIRCUIT JUDGE

Tom S. Lee
UNITED STATES
DISTRICT JUDGE

Henry T. Wingate
UNITED STATES
DISTRICT JUDGE

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT**
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

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**Civil Action No. J86-0373(L)**

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**Eddie Burrell, et al.,**
***Plaintiffs,***

*v.*

**William A. Allain, et al.**
***Defendants.***

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# ORDER

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This cause is before the court on the plaintiffs' motion under Rule 59(e), Federal Rules of Civil Procedure, to amend the judgment entered by this court on December 31, 1986. After consideration of the plaintiffs' motion, the motion is granted to the extent herein noted.

The plaintiffs have moved this court to amend its judgment of December 31, 1986, to provide that the federal constitutional claims raised in this proceeding are dismissed for lack of jurisdiction because the provisions of the Tax Anti Injunction Act, 28 U.S.C. § 1341, bar these claims, rather than, as the judgment presently does, dismiss on the merits with prejudice. In its opinion delivered from the bench on December 18, 1986, this court ruled that concerning all federal constitutional issues, it found no racial motivation with respect to the enactment of any of the legislation, that if found there was no intentional racial or other impermissible discrimination with respect to the legislation, and that it found no conclusive evidence that the legislation impacted upon one race more than on another. The court then stated, as an alternative ground, that the constitutional claims were barred by the Tax Anti Injunction Act.

The court now acknowledges that the proper ruling, and the one that it now adopts, is that the federal constitutional claims raised in the pleadings in this case are barred by the Tax Anti Injunction Act and are therefore dismised for lack of jurisdiction. We should have ruled, and do now rule, alternatively, that in

the event any reviewing court should disagree with our holding that we lack jurisdiction of the federal constitutional claims, we specifically find as a fact, after briefing and litigation of the issues, and full and complete consideration of the constitutional claims raised by the plaintiffs, that the state legislation attacked by the plaintiffs in these proceedings was not motivated by constitutionally impermissible reasons, but rather was motivated by legitimate economic and political considerations; alternatively, the dismissal of the federal constitutional claims rests on a determination of the merits.

We shall also alter our judgment, pursuant to the plaintiffs' motion, to preserve the movants' right to later seek fees and expenses under Rule 37(c), Federal Rules of Civil Procedure.

The plaintiffs' motion to alter or amend the judgment is therefore granted to the extent noted herein. The final judgment will be amended accordingly, and reentered pursuant to this order.

SO ORDERED this the 15th day of January 1987.

E. Grady Jolly, Jr.
UNITED STATES
CIRCUIT JUDGE

Tom S. Lee
UNITED STATES
DISTRICT JUDGE

Henry T. Wingate
UNITED STATES
DISTRICT JUDGE

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT**
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
Jackson Division

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**Civil Action No. J86-0373(L)**

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**Eddie Burrell, et al.,**
***Plaintiffs,***

*v.*

**William A. Allain, et al.,**
***Defendants.***

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# Judgment

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In accordance with the opinion of the court rendered on December 18, 1986, and further in accordance with the reasons given in this court's order of today, January 15th, 1987, which is in response to the plaintiffs' motion filed pursuant to Rule 59(e), Federal Rules of Civil Procedure, judgment is hereby enetered in favor of all defendants and against the plaintiffs. This cause is finally dismissed with prejudice except with respect to the federal constitutional claims set forth in Counts XV and XVI of the Fourth Amended Complaint which are dismissed for want of jurisdiction as barred by the Tax Anti Injunction Act, 28 U.S.C. § 1341. Motions under Rule 37(c), Federal Rules of Civil Procedure, if any, shall be filed within the time period provided for claims for costs under Local Rule 15.

The costs of this action are taxed against the plaintiffs.
SO ORDERED, this the 15th day of January 1987.

E. Grady Jolly, Jr.
UNITED STATES
CIRCUIT JUDGE

Tom S. Lee

UNITED STATES
DISTRICT JUDGE

Henry T. Wingate

UNITED STATES
DISTRICT JUDGE

APPENDIX E

**UNITED STATES DISTRICT COURT**
SOUTHERN DISTRICT OF MISSISSIPPI
Jackson Division

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**Civil Action No. J86-0373(L)**

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**Eddie Burrell, Albert Butler, John D. Eggleston, Charles Johnson, Kenneth Vaughn, Individually and in Claiborne County Board of Supervisors, Willie Buck, Sr., Stella H. Jennings, Gerald B. Mitchell, Jr., and William Moulder**

*v.*

**William A. Allain, Governor of Mississippi, Edwin Lloyd Pittman, Attorney General of Mississippi, Dick Molpus, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, Mississippi State Board of Election Commissioners, and the State of Mississippi**

**(Three Judge Court)**

The Honorable E. Grady Jolly
The Honorable Tom S. Lee
The Honorable Henry T. Wingate

Date: May 30, 1986
Place: Jackson, Mississippi

THE COURT: We are aware that the state as well as the plaintiffs in this case need a speedy decision and it has been a speedy decision. It may not be the most thorough decision, but we will at least give you the reasons for our ruling.

Now the change that's at issue in this case revolves around the legislation enacted by the Mississippi State Legislature on April the 2nd, 1986, House Concurrent Resolution No. 41 proposing to amend Section 112 of the Mississippi Constitution by changing

many aspects of the tax structure of the state. House Concurrent Resolution No. 41 specifically directs the Secretary of State to submit the proposed amendment to the electorate in an enection to be conducted on the first Tuesday after the first Monday June, 1986. That is June the 3rd, 1986.

Now we will assume for the purposes of our opinion that the Attorney General is correct in its contention that the applicable statute is Section 23-5-171 as far as the statute pursuant to which elections are set dealing with constitutional amendments. Nevertheless, we believe that the proposed or objected to change in this case is subject to preclearance. We base that decision on the facts before us and on the law by which we are controlled.

The facts before us indicate that since the passage of the Civil Rights Act there have been 30 elections that have dealt with constitutional amendments and of those 30 elections approximately six were conducted on dates other than November. Since 1970 there has been no election on a constitutional amendment that has been conducted on any date other than the November date, and there have been 21 such elections conducted in November. It is clear from that evidence that a pattern and practice exists of conducting elections with respect to constitutional amendments in November.

Section 5 of the Voting Rights Act does not apply only to changes in statutes, but applies to changes in practice as well. Clearly where since 1970, 21 elections have been conducted in November and in 1986 for the first time since 1970 in the 22nd election the date is changed, we consider that to be a change in an existing practice that subjects the setting of that date to the requirements of Section 5 of the Voting Rights Act.

We are also, of course, influenced in reaching our decision particularly by the case of Garcia v. Guerra, 744 Fed.2nd 1159. In this case the Fifth Circuit decided that a change in the standard election date for a general election in Texas for an election in Texas was a change that was covered by the Section 5 of the Voting Rights Act. Under state law the Legislature had permitted this kind of election to be held on four different occasions, in January, April, August and November, and all four of those dates were provided by statute and all four of the dates reflected in that statute had been precleared and approved by the Department of Justice for dates upon which elections could be held.

The election at issue was to be held in August. Even though the August election date had been precleared as I've indicated by the Department of Justice in its statutory form, it nevertheless was a departure from the election date that was usually held in April, and the Fifth Circuit held clearly that the change of this election date from April to August was a change that was a change in practice that was required to be cleared with the Justice Department. It is clear based on that decision that the change in the date here, notwithstanding the provisions of the Mississippi state statute 23-5-171 that provide that it can be held at any time the Legislature may provide in a concurrent resolution, is a change in practice.

Now I would indicate to you that if there had been other elections in which there was no practice and based upon which we could say that no practice had been established that all constitutional elections were conducted in November, it would be quite different. Or if the state had been able to show that exceptions were made to the general rule that elections were held in November and that those exceptions were based upon some sort of consistent, logical reasoning that established a practice within itself and that this election was consistent with that practice, if those had been the facts, we could have faced a different situation, but we do not need to decide that issue because those are not the facts that we're confronted with.

Now we have held that this election is subject to the preclearance provisions of the Voting Rights Act of 1965. We are next confronted with the issue as to what remedy is required for this particular violation. We are convinced that the election should not be enjoined and it will not be enjoined. We base our conclusion on several factors. We are cognizant that while we may not consider the implication of racial discrimination in making the legal determination as to whether the subject changes be subjected to the preclearance procedures of the Voting Rights Act, we may nevertheless consider the implication of the statute, the seriousness of the violation, the impact upon the right to vote and upon the impact upon the minority citizens whom the act was intended to protect when we fashion a remedy.

First, we see no evidence here that there are racial implications in the decision to set the election in June instead of November. First, there has been no evidence adduced that would convince

us of that. With respect to the contention that fewer black persons may vote in November than in June, we have no grounds upon which to rest such an assumption, and we are convinced that the state had a legitimate interest in setting the election in June instead of November for the reasons that have been developed and referred to in the earlier part of this hearing.

It is important to the state that it implement the act pursuant to which the constitutional amendment authorizes sometime around July 1st and if the election were held in November, the usual scheduled time, the implementation of this particular act would be delayed and delayed to the detriment of the citizens of the State of Mississippi, not one county, not a dozen counties but 82 counties.

We think the fact that the election has already been set is another consideration. The election machinery is in place, the state is prepared to go forward with the election is another reason that we think that any injunction at this time is inappropriate. We do not see that this is a flagrant violation of the Voting Rights Act. It is not one, it seems to us, in which a remedy is required because of any misconduct on the part of the state or any deliberate evasion on the part of the state. The state has an arguable reason, it seems to us, though obviously not entirely persuasive, that the change was not subject to preclearance.

And finally with respect to the contention that this court issued an injunction recently enjoining elections in the judicial contests, we are not persuaded that that is applicable or relevant to the facts before us. The argument has been made that the injunction was necessary in that case and is likewise necessary here because of the confusion that will result to the voter. We do not find the same degree of confusion, if any confusion at all. In fact, we see no confusion as such that will be evident if this election is allowed to proceed.

Finally we should add as far as the state is concerned that this particular decision of ours is rather narrowly drawn as far as the remedy is concerned. We think that the state is negligent in having passed the law and set an election in which they knew or should have known that it could not be precleared within the 60 days that the Attorney General has to preclear an election. The court is not absolutely certain that the Attorney General would need that much time. But in any event, the time factor is something

that the Legislature ignored and we think inapprorpriately ignored.

Thus the effect of our holding today is to hold that the subject change is required to be precleared by the Department of Justice under Section 5 of the Voting Rights Act. Our remedy or our response to the request for an injunction is to deny the injunction so far as it enjoins the election. We do, however, enjoin the state from implementing any changes pursuant to the results of the election until such time as it obtains preclearance from the Justice Department or the United States District Court for the District of Columbia, as required by Section 5, or until further order of this court.

Does anyone have any request for a clarification?

This court is adjourned.

Mr. Wallace: No, Your Honor.

Mr. Martin: No, Your Honor.

(Court adjourned).

APPENDIX F

**UNITED STATES DISTRICT COURT**
**Jackson Division**

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**Civil Action No. J86-0373(L)**

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**Eddie Burrell, Albert Butler, John D. Eggleston, Charles Johnson, Kenneth Vaughn, Individually and in their official capacities as members of the Claiborne County Board of Supervisors, Willie Buck, Sr., Stella H. Jennings, Gerald B. Mitchell, Jr., and William M. Moulder,**
***Plaintiffs***

*vs.*

**William A. Allain, Governor of Mississippi, Edwin Lloyd Pittman, Attorney General of Mississippi, Dick Molpus, Secretary of the State of Mississippi, in their official capacities and as members of Mississippi State Board of Election Commissioners, Mississippi State Board of Election Commissioners, and the State of Mississippi,**
***Defendants.***

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***ORDER***

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This cause having come on for hearing on May 30, 1986, on the plaintiffs' request for the convention of a three-judge district court and motion for preliminary injunction, and the court having considered the pleadings and exhibits offered by the parties, having heard and considered the arguments of counsel, and being fully advised in the premises, finds:

1. This action brought under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, is required to be heard by a district court of three judges, pursuant to 28 U.S.C. § 2284.

2. The defendant State of Mississippi is a jurisdiction covered by the special provisions of Sections 4 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973b and 1973c.

3. House Concurrent Resolution No. 41, adopted by the Mississippi legislature at its 1986 session, requires the conduct of an election on the first Tuesday after the first Monday of June 1986. The State alleges that when the legislature set the date of June 3, 1986, to vote on H.C.R. No. 41, it was acting under Miss. Code Ann. § 23-5-171 (Supp. 1985), which provides, "Constitutional amendments shall be voted for at the time fixed by the concurrent resolution," but the court does not find it necessary to resolve this issue. Since 1980, 109 amendments have been proposed to the constitution of 1980. On 13 of the 109 proposed amendments, elections have been held at dates other than the dates of the November general election. Since November 1, 1964, 30 amendments have been proposed and 6 of them have been scheduled for election at times other than the November general election. The last non-November election on a proposed constitutional amendment was held in June 1970. Since 1970, 21 separate constitutional referenda have been held in November. This constitutes a standard, practice, or procedure with respect to voting under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The holding of an election on a proposed constitutional amendment at a time other than the general election in November deviates from the State's prior custom and practice, and constitutes a change of a standard, practice, or procedure with respect to voting that must be approved under Section 5 of the Voting Rights Act of 1965. See *Garcia v. Guerra,* 744 F.2d 1159 (5th Cir. 1984).

4. Although defendant Pittman on May 6, 1986, requested the Attorney General of the United States approve the conduct of the election required by H.C.R. No. 41, the Attorney General of the United States has not yet indicated whether he will object to or preclear the conduct of the election required by H.C.R. No. 41. The sixty days within which he is entitled to consider the submission will not expire until after the date scheduled for the election under H.C.R. No. 41.

5. The plaintiffs are adult resident citizens of the State of Mississippi and registered voters of the State of Mississippi, and thus enjoy rights protected under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

6. The public interest will not be best served by enjoining the conduct of the election scheduled for June 3, 1986. The machinery

for the conduct of the election is already in place, and a delay in the election could complicate the assessment, levy, and collection of property taxes due for the year 1986. Although the State, through its legislature, was perhaps careless in setting a date for an election without granting sufficient time for the preclearance of that date as required by Section 5 of the Voting Rights Act, the State's violation of the Voting Rights Act is not flagrant because it had an arguable reason for considering that the setting of the election date was not subject to the provisions of Section 5. Whether there has been a change of standard, practice, or procedure with respect to voting that is subject to Section 5 preclearance is not determined by whether the conduct of the election has the purpose or effect of denying or abridging the right to vote on account of race or color, but we may consider evidence bearing upon that question in fashioning our remedy. Neither party has chosen to present such evidence. The court considers the absence of such evidence as a factor weighing in favor of the State's position that the conduct of the election should not be enjoined. Moreover, the rights of the plaintiffs may be adequately protected by enjoining the defendants from implementing the changes in the Mississippi Constitution brought about as a result of the election until such time, if any, as the conduct of the election required by H.C.R. No. 41 is properly approved pursuant to Section 5.

IT IS THEREFORE

ORDERED that the court hereby declares that H.C.R. No. 41, insofar as it schedules an election for the first Tuesday after the first Monday of June 1986, constitutes a change of a standard, practice, or procedure with respect to voting which must be approved under Section 5 of the Voting Rights Act of 1965. It is further

ORDERED that insofar as the Motion for Preliminary Injunction requests this court to enjoin the conduct of said election on June 3, 1986, the motion is hereby denied. It is further

ORDERED that the defendants are enjoined from approving, implementing, or administering in any manner the amendments to Section 112 of the Mississippi Constitution proposed by H.C.R. No. 41, should those amendments be approved by the voters at the election on June 3, 1986, until such time, if any, that the conduct of said election has been approved by the Attorney

General of the United States or the United States District Court for the District of Columbia, as required by Section 5 of the Voting Rights Act, or until further order of this court.

ORDERED this the 16th day of June, 1986.

E. Grady Jolly
UNITED STATES
CIRCUIT JUDGE

Tom S. Lee
UNITED STATES
DISTRICT JUDGE

Henry T. Wingate
UNITED STATES
DISTRICT JUDGE

APPENDIX G

**UNITED STATES DISTRICT COURT**
SOUTHERN DISTRICT OF MISSISSIPPI
Jackson Division
Jackson Division

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**Eddie Burrell, Albert Butler, John D. Eggleston, Charles Johnson, Kenneth Vaughn, Individually and in their Official Capacities as Members of the Claiborne County Board of Supervisors, Willie Buck, Sr., Stella H. Jennings, Gerald B. Mitchell, Jr., and William H. Moulder,**
***Plaintiffs,***

*vs.*

**William A. Allain, Governor of the State of Mississippi, Edwin Lloyd Pittman, Attorney General of the State of Mississippi, Dick Molpus, Secretary of State of the State of Mississippi, in their Official Capacities as Members of the Mississippi State Board of Election Commissioners, C.A. Marx, Nicki Martinson, and W.A. Wilkerson, in their Official Capacities as Members of the Mississippi State Tax Commission, Mississippi State Tax Commission and the State of Mississippi,**
***Defendants.***

## ORDER

This cause came before the court on the motion of the defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Summary judgment is appropriate if it is shown that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The court having considered the memoranda with attachments submitted by the parties and having heard oral arguments, is of the opinion that:

(1) The plaintiffs' claim that Senate Concurrent Resolution 519 violates sections 2 and 5 of the Voting Rights Act does not involve a standard, practice or procedure with respect to voting. The defendants' motion for summary judgment on this issue is therefore granted;

(2) The plaintiffs' claim that House Bill 388 violates sections 2 and 5 of the Voting Rights Act does not involve a standard, practice or procedure with respect to voting. The defendants' motion for summary judgment on this issue is therefore granted;

(3) Genuine issues of material fact remain relating to the plaintiffs' claim that House Resolution 41 violates sections 2 and 5 of the Voting Rights Act. The defendants' motion for summary judgment on this issue is therefore denied; and

(4) Genuine issues of material fact remain relating to the plaintiffs' claim that House Resolution 41 violates the fourteenth and fifteenth amendments of the United States Constitution. The defendants' motion for summary judgment on this issue is therefore denied.

IT IS THEREFORE ORDERED that the defendants' motion for summary judgment is granted in part and denied in part as set forth above.

IT IS FURTHER ORDERED that the plaintiffs' Motion to Strike and for Partial Summary Judgment be granted with respect to the defendants' second, third and fourth defenses regarding the Tax Injunction Act insofar as they apply to the plaintiffs' voting rights claims concerning H.C.R. 41. The question whether the Tax Injunction Act bars the plaintiffs' fourteenth and fifteenth amendment claims is held under advisement.

ORDERED this the 17th day of November 1986.

E. Grady Jolly
UNITED STATES
CIRCUIT JUDGE

Tom S. Lee
UNITED STATES
DISTRICT JUDGE

Henry T. Wingate
UNITED STATES
DISTRICT JUDGE

APPENDIX H

**UNITED STATES DISTRICT COURT**
SOUTHERN DISTRICT OF MISSISSIPPI
Jackson Division

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Civil Action No. J86-0373(L)

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Eddie Burrell, et al.
***Plaintiffs,***

*v.*

**William A. Allain, et al.,**
***Defendants.***

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that Eddie Burrell, et al., plaintiffs in this action, hereby appeal to the Supreme Court of the United States from final judgment entered in this action on December 31, 1986, as amended by the judgment entered January 15, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,
Eddie Burrell, et al.
By Their Attorneys,
Phelps, Dunbar, Marks,
Claverie & Sims
By: _____
Michael B. Wallace

Phelps, Dunbar, Marks, Claverie & Sims
1080 Flynt Drive, Suite E
P.O. Box 55507
Jackson, Mississippi 39216
Tel: (601) 939-3895

## CERTIFICATE OF SERVICE

I, Michael B. Wallace, do hereby certifiy that I have this day mailed a true and correct copy of the foregoing Notice of Appeal

to the Supreme Court of the United States to Richard Jones, Esquire, Attorney General's Office, P.O. Box 220, Jackson, MS. 39205.

This the 29th day of January, 1987.

Michael B. Wallace

APPENDIX I

**UNITED STATES DISTRICT COURT**
SOUTHERN DISTRICT OF MISSISSIPPI
Jackson Division

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**Civil Action No. J86-0373(L)**

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**Eddie Burrell, Albert Butler, John D. Eggleston, Charles Johnson, Kenneth Vaughn, Individually and in their Official Capacities as Members of the Claiborne County Board of Supervisors, Willie Buck, Sr., Stella H. Jennings, Gerald B. Mitchell, Jr., and William H. Moulder**
***Plaintiffs,***

*vs.*

**William A. Allain, Governor of the State of Mississippi, Edwin Lloyd Pittman, Attorney General of the State of Mississippi Dick Molpus, Secretary of the State of Mississippi, in their Official Capacities as Members of the Mississippi State Board of Election Commissioners, C. A. Marx, Nicki Martinson, and W. A. Wilkerson, in their Official Capacities as Members of the Mississippi State Tax Commission, Mississippi State Tax Tax Commission and the State of Mississippi**
***Defendants.***

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# PRETRIAL ORDER

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...

3. The pleadings are amended to conform with this pretrial order.

4. The following claims (including claims stated in the complaint), counterclaims, third party claims, cross-claims, etc., have been filed.

Plaintiffs assert the following causes of action against all defendants:

a. The defendants failed to preclear the following standards, practices or procedures with respect to voting pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973c:

(i) House Concurrent Resolution No. 41 ("H.C.R. No. 41") insofar as it sets the date for a special election (Counts I and II), authorizes the legislature to withdraw taxing authority from a county (Count VI), offers more than one amendment to be determined at a single election (Count VIII), and authorizes the legislature to provide for taxation of nuclear plants by a single majority (Count IX);

(ii) Senate Concurrent Resolution No. 519 ("S.C.R. No. 519") insofar as it sets the date for a special election (Count III), authorizes the legislature to withdraw taxing authority from a county (Count V) and offers more than one amendment to be determined at a single election (Count VII);

(iii) House Bill No. 388 ("H.B. No. 388") (Count X);

(iv) The change in Mississippi's practice, required by Miss. Code. Ann. § 23-5-141 (1972), of printing the entire concurrent resolution and the proposed amendment on the ballot with respect to the special elections required by H.C.R. No. 41 (Count IV), and S.C.R. No. 519 (Count XVII);

(v) The enactment of H.B. No. 388 without prior constitutional authorization (Count XI).

b. By enacting and administering S.C.R. No. 519, H.C.R. No. 41 and H.B. No. 388, the defendants violated the plaintiffs' right to equal protection guaranteed by the Fourteenth Amendment (Count XVI).

c. The defendant's conduct of the special elections required by S.C.R. No. 41 and S.C.R. No. 519 resulted in a denial or abridgement of the plaintiffs' right to vote on account of race or color in violation of § 2 of the Voting Rights Act of 1965 (Counts XII and XIII).

d. The imposition and application of H.B. No. 388, S.C.R. No. 519 and H.C.R. No. 41 have the purpose and

intent of denying or abridging the plaintiffs' right to vote on account of race or color in violation of § 2 of the Voting Rights Act of 1965 and the Fifteenth Amendment (Count XV).

e. The imposition and application of H.B. No. 388 resulted in a denial or abridgement of the right to vote on account of race or color in violation of Section 2 of the Voting Rights Act (Count XIV).

5. The basis for jurisdiction is:

Federal question: 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. §§ 1973c and 1973. A three judge court is required for the consideration of Counts I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XVII. Pursuant to § 2884 and 42 U.S.C. § 1973c the three judge court should exercise its pendent jurisdiction to consider Counts XII, XIII, XIV, XV and XVI.

There is the following jurisdictional question: Whether 28 U.S.C. § 1341, the Tax Injunction Act, precludes this Court from exercising jurisdiction in this case. The defendants further challenge the standing of plaintiffs to maintain this action. Defendants further contend that the Eleventh Amendment bars the litigation in this Court of certain issues and claims asserted herein.

...

7. The following is a *concise summary* of the ultimate facts as claimed by:

a. Plaintiffs:

During the 1986 legislative session, the Mississippi legislature passed H.B. No. 388, which deprived the Claiborne County Board of Supervisors of the right to assess and collect ad valorem taxes on the Gtand Gulf Nuclear Power Plant ("Grand Gulf"), and deprived the individual plaintiffs of the benefits of those revenues as residents and taxpayers of Claiborne County. At the same session, the legislature adopted H.C.R. No. 41, which proposed an amendment to Section 112 of the Mississippi Constitution authorizing the legislature to alter the tax status of Grand Gulf and to establish new assessment ratios for various classes of property. The defendants have also claimed that H.B. No. 388 is implicitly authorized by an earlier amendment to Section 112 adopted pursuant to S.C.R. No. 519, which was approved by the legislature in 1982. Both of those resolutions required holding

of special elections to approve the proposed constitutional amendments. The defendants have not claimed the existence of any other constitutional authority for the enactment of H.B. No. 388. Neither the conduct of these elections nor the substance of S.C.R. No. 519, H.C.R. No. 41 and H.B. No. 388 were precleared under Section 5 of the Voting Rights Act.

H.C.R. No.41 required the defendant Secretary of State to submit the proposed amendment to the electors at the special election to be held the first Tuesday after the first Monday in June. It had been the prior custom and practice of the defendants to hold such election on the first Tuesday after the first Monday in November, as is now required by a 1984 amendment to Miss. Code. Ann. § 23-5-203. Changing the election date to the month of June decreased from 7 months and 2 weeks to 6 weeks the amount of time between the passage of the legislation and the scheduled election date. The failure to obtain approval for this change before the election was a violation of Section 5 of the Voting Rights Act.

The conduct of the election also resulted in discrimination, in violation of Section 2 of the Act. This decrease between the passage of the legislation and the election date resulted in a shorter period of time for the primary opponents of the bill, black citizens, to rally support against the bill. The history of discrimination against blacks in Mississippi affected the ability of black voters to prepare in six weeks for the June election. Past discriminatory legislation and other official acts had prevented blacks from being elected to office at both state and local levels. Consequently, black politicians in state government are on the whole young and inexperienced and have not had time or the resources to form state-wide political networks like white politicians. When black political leaders need to educate the public about certain legislation they lack the necessary funds as well as the public and private political associations available to whites.

Consequently, when the legislature gave Claiborne County, a majority black county, six weeks to educate the public on H.C.R. No. 41, the black opponents to the legislation lacked the political networks and the resources to educate their allies. The past history of discrimination in Mississippi and the lack of resources simply prevented the plaintiffs from gearing up for the election in six weeks.

Blacks have generally supported constitutional amendments by a small majority. This pattern changes only when a concerted effort has been made over a significant period to educate blacks about the effect of a particular constitutional amendment. For instance, a massive campaign by the state media, elected officials, and teachers' groups produced a 65% black majority for the 1982 education amendment, even though whites opposed it. Its primary Senate sponsor admits that support for H.C.R. No. 41 decreased from the time of its passage. If black opponents had been granted more time by the legislature, the amendment could have been defeated.

The task the plaintiffs faced was complicated by the failure of the defendants to take any steps to explain H.C.R. No. 41 to the public prior to the election. Such press coverage as there was focused on the property tax reclassification provisions of the amendment, and ignored Grand Gulf altogether. The President-elect of the Mississippi Tax Assessors/Tax Collectors Association argued that the amendment would decrease taxes on homesteads; however, it has actually increased taxes on homesteads of low value, the only kind that most blacks can own, and it does not in fact cover all homestead property. The Executive Director of the association had asked the defendant Pittman for an interpretation of the amendment, but did not receive a response until after the election was over. The defendant State Tax Commission did not explain how it intended to interpret and apply the amendment until after the election. The Executive Director of the association testified that, although he had advised homeownerss to vote for the amendment, had he known the interpretations would be applied by the defendants Pittman and State Tax Commission, he would have campaigned vigorously against the amendment. Naturally, none of the plaintiffs took any steps to explain to the public the tax relief afforded prosperous homeowners would come at the expense of poor people, primarily blacks.

Both the 1982 and 1986 elections were further defective in that many counties failed to print the entire text of the proposed amendments on their voting machines, contrary to the requirements of Miss. Code Ann. § 23-5-141 (1972). The defendants violated Section 5 in failing to secure the approval of federal authorities for this departure from Mississippi law.

Moreover, the absence of the text of these amendments contributed to the discriminatory results of both elections, in that voters who wished to learn the details of those amendments were unable to do so at the polls. The 1982 election was further discriminatory in that officers of the defendant State of Mississippi assured the plaintiffs through their representatives in the legislature that the amendment would have no effect on the county's ability to tax Grand Gulf. This, in 1982 the plaintiffs were completely deprived of their opportunity to defend their interests at the special election, since they did not even know that their interests were being threatened.

S.C.R. No. 519, H.C.R. No. 41, and H.B. No. 388, which together divest Claiborne County of its taxing authority on Grand Gulf, have been tainted by intentional racial discrimination. The State's original justification for singling out Grand Gulf for special treatment was that it was not feasible to treat non-nuclear power plants the same way; the State has now admitted this assertion to be false, and it has offered no other justification. Many members of the legislature have indicated in public and in private that the government of Claiborne County could not wisely spend its tax money from Grand Gulf, thus displaying stereotypically demeaning attitudes toward blacks. The only possible basis for the different treatment accorded to Claiborne County, as opposed to other counties with electrical generating plants such as Harrison, Jackson, and Hinds Counties, is that Claiborne County is governed by blacks, while the other counties are governed by whites. Moreover, both S.C.R. No. 519 and H.C.R. No. 41 operate to shift the ad valorem tax burden from whites toward blacks, as they were intended to do.

b. Defendants:

This action has been brought by nine individual plaintiffs. It has never been certified as a class action on behalf of any particular or discrete group. The district court lacks subject matter jurisdiction of this action pursuant to the Tax Anti-Injunction Act, 28 U.S.C. § 1341, and related principles of comity, equity, and federalism. Moreover, the individual plaintiffs lack standing to challenge the measures in question, and the Eleventh Amendment bars the litigation in this Court of certain state law issues and claims asserted by plaintiffs.

As stated in defendants' Motion to Dismiss and/or for

Summary Judgment, it is defendants' position that every claim made by plaintiffs against them in the complaint is either clearly resolvable in defendants' favor as a matter of law or that plaintiffs have no probative evidence to support their claims.

In challenged part, S.C.R. No. 519, adopted by the Legislature and ratified by the electorate in November 1982, amended § 112 of the Mississippi Constitution to permit the Legislature to exempt particular species of property from ad valorem taxes. H.C.R. No. 41, adopted by the Legislature and ratified by the electorate in June 1986, amended § 112 of the Mississippi Constitution and clarified the Legislature's authority to deny a situs county the right to impose ad valorem taxes on nuclear generating plants and to provide for a special mode of assessment and levy on such nuclear plants and for the distribution of tax revenue from same. H.B. No. 388, passed by the Mississippi Legislature in 1986, withdrew from a situs county (Claiborne County) the authority to levy ad valorem taxes on a nuclear power plant (Grand Gulf), required that the utility which owned Grand Gulf make payments to the State Tax Commission in lieu of ad valorem taxes, and provided for a method of distribution of the in lieu payments back to the situs county and other counties served by the utility.

In law and in fact, no aspect of the substance, method of adoption, conduct of election, election date, or otherwise regarding H.C.R. No. 41 violated § 5 of the Voting Rights Act, 42 U.S.C. § 1973c or § 2 thereof, 42 U.S.C. § 1973, in that, as the case may be, (a) H.C.R. No. 41 is not in subtance a "standard, practice, or procedure" with respect to voting, and/or (b) there was no "change" from any practice or procedue with respect to voting which has not been precleared or that was different from that in force and utilized in November 1964, and/or (c) no action of defendants had the purpose or effect of denying these plaintiffs the right to vote or an opportunity to participate in the political process on the basis of race, or had a "potential" for discrimination affecting voting, and/or (d) the alleged conduct is not attributable to the state defendants, and/or (e) the issues presented are of state law which have been adversely decided to plaintiffs.

Insofar as plaintiffs seek to challenge H.B. No. 388, H.C.R. No. 41, or S.C.R. No. 519 under the Equal Protection Clause of the Fourteenth Amendment, none of the measures were in fact

enacted for a racially-discriminatory purpose, and plaintiffs have no probative evidence that they were. Moreover, insofar as plaintiffs seek to make a traditional equal protection challenge, they cannot meet their burden of demonstrating that the measures are wholly arbitrary or irrational, and defendants submit that legitimate and rational reasons plainly exist for each of the enactments.

8. The following facts are established by the pleadings or by stipulation or admission:

a. Since 1965 the State of Mississippi has been and is covered by the suspension of tests provision (Section 4) and the preclearance provision (Section 5) of the Voting Rights Act of 1965.

b. Four of the five elected supervisors of Claiborne County are black.

c. All of the elected officials of the city of Port Gibson are white.

d. The population of the Mississippi Power and Light Company service area, throughout which the revenues of Grand Gulf Nuclear Power Plant will be spread pursuant to H.B. No. 388, is majority white.

e. As a result of the ratification of H.C.R. No. 41, the statewide tax burden will be reduced on property in Class I as defined therein, and increased on all of the other classes.

f. According to the United States Census, decennial population statistics for the State of Mississippi are as follows:

| Year | Total Pop. | Black(%) | (%) Black VAP |
|---|---|---|---|
| 1960 | 2,178,141 | 915,743 (42.04) | 422,273 (35.98) |
| 1970 | 2,216,994 | 815,770 (36.79) | 431,617 (31.43) |
| 1980 | 2,530,638 | 887,206 (35.20) | 529,820 (31.04) |

g. Both parties agree that it is possible to set up a structure whereby the ad valorem taxes collected on non-nuclear power generating plants are redistributed throughout the area which they serve, but the defendants deny that such a structure is practical.

h. The Boards of Supervisors of Forrest, Harrison, Jackson, Lauderdale, Adams, Bolivar, Hinds, Warren, and Washington Counties are majority white.

i. By 1982 only an estimated 5.7% of the black voting age population of Mississippi was registered to vote.

j. According to W. B. Reynolds, who is the United States Assistant Attorney General for Civil Rights, since the Voting Rights Act was passed, 42 Mississippi counties—more than in any other state—have been designated for federal examiners (registrars) under the Voting Rights Act, and between 1975 and 1981 federal observers have been sent to observe elections in numerous Mississippi counties.

k. Mississippi had a long history of *de jure* and *de facto* race discrimination. That history includes the use of such discriminatory devices as poll taxes, literacy tests, residency requirements, white primaries, and the use of violence to intimidate blacks from registering for the vote.

l. In *Boykins v. City of Hattiesburg*, Civil Action No. H77-0062(C), Opinion, p. 12 (S.D. Miss. March 2, 1984), a federal district court found:

> This evidence clearly shows that there remains today the lingering effect of past discrimination in the operation of the office of the Circuit Clerk of Forrest County, which directly affects the right of black persons residing in Hattiesburg to register to vote.

m. In *Jordan v. City of Greenwood*, 599 F. Supp. 397, 400-01 (N.D. Miss. 1984), a federal district court found: "As this Court has heretofore found, it is well documented that a pattern of racial discrimination in the past has existed in Leflore County, Greenwood and Mississippi...."

n. In *Pendleton v. Hood*, Civil Action No. J83-0519(B) Order and Memorandum Opinion, p. 3 (S.D. Miss. October 20, 1983), a federal district court found: "Some evidence presented to this Court shows still today there exists present discrimination against the black citizens and voters in Copiah Count.

o. In *Donnell v. United States and Eddie Thomas, Sr.*, Civil Action No. 78-0392, Opinion, p. 7 (D.D.C. July 31, 1979), a federal district court stated: "Warren County's past history of discrimination in voting continues to affect black persons in the county, causing a lesser participation by blacks than whites in the political process."

p. In *State of Mississippi v. United States*, 490 F. Supp. 569,575 (D.D.C. 1979), a federal district court found:

> The effects of Mississippi's past history of racial discrimination in voting and other areas continues to affect

black people in many portions of the state today, which has resulted in a general lower participation by blacks than whites in the political process.

q. According to the 1980 census estimates based upon samples, in the State of Mississippi median family income (excluding, among others, the value of income "in kind" from food stamps, public housing subsidies, and medical care) for whites (all current 1980 dollars) was $17,264.00, and the median family income (excluding, among others, the value of income "in kind" from food stamps, public housing subsidies, and medical care) for blacks was $9,013.00, which was 52.21% of the median family income for whites.

r. According to the 1980 census estimates based upon samples, in the State of Mississippi of the 587,450 persons whose income (including, among others, the value of income "in kind" from food stamps, public housing subsidies, and medical care) in 1979 was determined to be below the poverty level, 383,971 were black, which is 65.35% of the total, and 44.4% of all black persons whose poverty status was determined had incomes (excluding, among others, the value of income "in kind" from food stamps, public housing subsidies, and medical care) below the poverty level, as compared with 12.6% of all white persons whose poverty status was determined.

s. According to the 1980 census estimate based upon samples, in the State of Mississippi for persons twenty-five years old and older the median years of school completed for whites was 12.4 years and the median years of school completed for blacks was 9.4 years. According to the same census table, 3.5% of the white persons twenty-five years of age and older had less than five years of elementary school, as compared with 16.7% of black persons twenty-five years of age and older; 63.9% of white persons twenty-five years of age or older were high school graduates, as compared with 32.7% of black persons twenty-five years of age and older; and 14.4% of white persons twenty-five years of age and older had four or more years of college, as compared with 7.1% of black persons twenty-five years of age and older.

t. According to the 1980 census estimate based upon samples, in the State of Mississippi as of 1980, 2.8% of whites sixteen years of age and over were unemployed, as compared with 6.6% of blacks sixteen years of age and older. Of 181,216 persons sixteen

years of age and over employed in managerial and professional specialty occupations, 149,860 (82.70%) were white and 30,050 (16.58%) were black; of 241,786 persons sixteen years of age and over employed in technical, sales, and administrative support occupations, 206,645 (85.47%) were white and 33,838 (14.0%) were black; of 115,426 persons sixteen years of age and over employed in service occupations, 55,275 (47.89%) were white and 59,043 (51.15%) were black; and 22.9% of employed black persons sixteen years of age and over were employed in service occupations.

u. According to the 1980 census, in the State of Mississippi the median value of white-owned, occupied housing units was $35,400.00, and the median value of black-owned, occupied housing units was $20,500.00; 1.7% of white occupied housing units lacked complete plumbing for exclusive use, as compared with 15.7% of black-occupied housing units; and 3.1% of white-owned housing units had 1.01 or more persons per room, as compared with 19.3% of black-occupied housing units.

v. According to the 1980 census estimates based upon samples, in the State of Mississippi of 576,306 white-occupied housing units, 38,931 (6.76%) had no vehicle available at home for the use of the members of the household; of 256,151 black-occupied housing units, 68,390 (27.78%) had no vehicle available at home for the use of the members of the household; and of a total of 107,968 occupied housing units in Mississippi with no vehicle available at home for the use of members of the household, 68,390 (64.34%) were occupied by blacks.

w. According to the *Mississippi Statistical Abstract, 1984*, the Mississippi State Board of Health reported for 1982 that the Infant mortality rate for whites was 10.4 per 1,000 live births, and for non-whites was 20.9 per 1,000 live births.

x. The three-judge court in *Jordon v. Winter,* 604 F. Supp. 807, 812 (N.D. Miss. 1984), *aff'd sub nom. Mississippi Republican Executive Committee v. Brooks,* __ U.S. __, 105 S. Ct. 416 (1984), found:

> That evidence of socio-economic disparities between blacks and whites in the Delta area and the state as a whole is also probative of minorities' unequal access to the political process in Mississippi. Blacks in Mississippi, especially in its Delta region, generally have less education, lower

incomes, and more menial occupations than whites. The State of Mississippi has a history of segregated school systems that provide inferior education to blacks. *See* United States Commission on Civil Rights, *Voting in Mississippi*, pp. 3-4 (1965). Census statistics indicate lingering effects of this past discrimination: the median family income in the Delta Region (Second District) for whites is $17,467, compared to $7,447 for blacks; more than half of the adult blacks in the Second District have attained only 0 to 8 years of schooling, while the majority of white adults in this District have completed four years of high school; the unemployment rate for blacks is two to three times that for whites; and blacks generally live in inferior housing.

y. In *Moore v. Leflore County, Mississippi,* Civil Action No. GC83-249-WK-O, Memorandum of Decision, p. 8, (N.D. Miss. June 5, 1985) a federal district court found: "The disadvantages of blacks in education, income, employment, living conditions, and health render their participation in political affairs less effective...."

z. In *Lucas v. Bolivar County, Mississippi,* Civil Action No. D.C. 83-136-WK-O, Memorandum of Decision, p. 14, a federal distrct court found: "The disparities between blacks and whites in education and income...do, to some extent, hinder the ability of blacks to participate fully in the electoral process."

aa. In *Jordan v. City of Greenwood,* 599 F. Supp. 397, 401 (N.D. Miss. 1984),

> The Court found: Socio-economic data show that blacks are substantially disadvantaged compared to whites in education, income, poverty status, employment, living conditions, and health. These disadvantages have contributed to decrease black political participation in Greenwood and make that participation less effective.

bb. In *Jordan v. Winter, supra*, the three-judge district court found:

> Plaintiffs have established that voters in Mississippi have previously voted and continue to vote on the basis of the race of candidates for elective office. ...
> Plaintiffs' proof also based on analysis of these [1982 primary and general] election returns, demonstrated a consistently high degree of racially polarized voting in the

1982 election and previous elections. From all evidence, we conclude that blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidate on the basis of race. We therefore find racial bloc voting operates to dilute black voting strength in congressional districts where blacks constitute a minority of the voting age population.

cc. In *Jordan v. City of Greenwood*, 599 F. Supp. 397, 402 (N.D. Miss. 1984), the Court found:

> [T]he unchallenged expert opinion, based upon statistical evidence, shows an extraordinarily high level of racial bloc voting, with little crossover voting of whites for black candidates or blacks for white candidates.

dd. H.B. No. 387 provides for the distribution of all in lieu funds received from the Tennessee Valley Authority and not only those funds attributable to the Yellow Creek Nuclear Reactor, which is defunct and does not generate electrical power.

ee. The cost of privately-owned electical generating plants, whether nuclear or conventional, are ultimately borne by the consumers such plants serve.

ff. A greater proportion of the electrical power generated by Grand Gulf is sold outside the State of Mississippi as compared to any other electrical generating plant located within the State of Mississippi.

gg. By letter of July 7, 1986, the Justice Department stated it had no objection to the date of holding the referendum election on the proposed amendment in H.C.R. No. 41. The defendants did not preclear any other action challenged in this case prior to administering those actions.

hh. As of 1961, only 6.2% of the black voting age population in Mississippi was registered to vote.

ii. The Grand Gulf Nuclear Plant is presently the only existing and operating nuclear electrical generating plant in Mississippi.

jj. The Mississippi Power Company Plant in Jackson County sells some of its power outside of Mississippi.

kk. The Mississippi legislature in 1966 adopted H.B. 183, requiring that the superintendent of education in eleven counties be appointed by the county boards of education, and allowing all other counties to conduct a referendum on whether the superintendent should be appointed or elected. Nine of the eleven

counties in which the appointment of the county school superintendent was required, including Claiborne County, had black population majorities. The defendants also assert that this action was taken because the school superintendents for these eleven counties had no responsibility for buildings or students.

The parties reserve the right to object to the admission of these stipulations on the ground of relevancy.

...

THIS the 26th day of November, 1986.

E. Grady Jolly, Jr.
UNITED STATES
CIRCUIT JUDGE

Tom S. Lee
UNITED STATES
DISTRICT JUDGE

Henry T. Wingate
UNITED STATES
DISTRICT JUDGE

APPENDIX J

**UNITED STATES DISTRICT COURT**
SOUTHERN DISTRICT OF MISSISSIPPI
Jackson Division

**Civil Action No. J86-0373(L)**

**Eddie Burrell, et al.,**
***Plaintiffs,***

*v.*

**William A. Allain, et al.,**
***Defendants.***

DEFENDANTS' SECOND SUPLEMENTAL RESPONSE TO PLAINTIFFS' REQUESTS FOR ADMISSIONS

...

**Request No. 9:**

In its 1954 regular session the Mississippi Legislature adopted a resolution to amend Section 244 of the Mississippi Constitution to require applicants for voter registration to demonstrate "a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government." Miss. Laws, 1954, Chap. 427, a true and correct copy of which is attached hereto as Exhibit 2. The proposed constitutional amendment exempted all persons registered to vote before January 1, 1954. In the campaign for its ratification, proponents of the Amendment stated that its purpose was "solely to limit Negro registration." *Jackson Daily News*, October 28, 1954. The amendment was adopted by referendum in November, 1954. This constitutional amendment was then implemented by the Mississippi Legislature in its extraordinary session in January, 1955. Miss. Laws, 1955 Extra. Sess., Chap. 104, a true and correct copy of which is attached hereto as Exhibit 3. *Voting in Mississippi*, p. 6.

**Response:**

Denied. These defendants admit that in 1954 at this regular session the Mississippi Legislature adopted a resolution proposing an amendment to Section 244 of the Mississippi Constitution of 1890 which provided in part that an elector shall demonstrate "a reasonable understanding of the duties and obligations of citizenship under a constitutional form of goverment...", and that new or additional qualifications imposed by that section shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954, 1952 Miss. Laws ch. 427; that the amendment was ratified at an election in November, 1954; and that this amendment was placed into effect by the Mississippi Legislature at its extraordinary session in 1955, 1955 Miss. Laws (Extra. Sess.) ch. 104. The defendants also admit that Exhibit 2 is a true and correct copy of 1954 Miss. Laws ch. 427 and that Exhibit 3 is a true and correct copy of 1955 Miss. Laws (Extra Sess.) ch. 104.

**Request No. 10:**

In 1960, the Mississippi Constitution was amended to require "good moral character" as a qualification for voting, Miss. Const., Art. 12, § 241-A (1960), a true and correct copy of which is attached hereto as Exhibit 4.

**Response:**

Denied. These defendants admit that the Mississippi Constitution of 1890 was amended in 1960 to insert a section which provided that qualified electors "shall be of good moral character," Miss. Const. Art. 12, § 241-A, that Exhibit 4 is a true and correct copy of said section, and that this section was repealed in 1965.

**Request No. 11:**

In 1962, a number of other provisions relating to voter registration were enacted by the Mississippi Legislature, including laws requiring that an (a) applicant demonstrate "good moral character" (Miss. Laws, 1962, Chap. 569, § 1); (b) that applicants fill in all blanks on the application "properly and responsively" without assistance (Miss. Laws, 1962, Chap. 570, § 1); (c) that registrars be prohibited from

telling an applicant why they were rejected (Miss. Laws, 1962, Chap. 571, § 2); (d) that all applicants' names be published in the newspaper (Miss. Laws, 1962, Chap. 572, § 1); (e) that any applicant's qualifications could be challenged by any voter (Miss. Laws, 1962, Chap. 573, § 2), and (f) that all designation of race be eliminated from county poll books (Miss. Laws, 1962, Chap. 574, § 1).

**Response:**

Denied. These defendants admit that in 1962 the Mississippi Legislature enacted the following statutes regulating voter registration: 1962 Miss. Laws ch. 569. § 1, which, among other things, enforced the requirement of Section 241-A of the Mississippi Constitution that anyone registering to vote shall be of good moral character by specifying that the application forms for voter registration ask certain questions which were designed, among other things, "to demonstrate to the county registrar that applicant is a person of good moral character as required by Section 241-A of the Constitution of Mississippi"; 1962 Miss. Laws ch. 570 § 1, which provided that voter registration applications were to be "properly and responsively filled out by the applicant" without assistance except that the county registrar could fill out the application based upon the unassisted dictation of an applicant who was physically disabled from writing his application; 1962 Miss. Laws ch. 571, § 2 which provided that the registrar was to endorse the word "failed" on the application, without specifying the reasons, of any applicant who had not complied with the Constitution and laws of this state governing entitlement to vote; 1962 Miss. Laws ch. 572, which required the newspaper publication of the names and addresses of applicants; 1962 Miss. Laws ch. 573, § 2, which provided a method by which any qualified elector of the county might challenge "the good moral character of any applicant and any other requirement of any applicant to vote"; and 1962 Miss. Laws ch. 574, which amended Section 3232 of the Mississippi Code of 1942, Recompiled, so as to eliminate from the poll book the color of the electors appearing thereon.

...

**Request No. 61:**

In 1980, the State of Mississippi adopted constitutional provisions such as literacy tests and a poll tax which were designed to exclude blacks from participation in the political process.

**Response:**

The defendants deny that such action was taken in 1980. However, the defendants admit such action was taken in 1890.

**Request No. 62:**

In 1954, following a decision of the Court of Appeals for the Fifth Circuit in *Peay v. Cox,* 190 F. 2d 123 (5th Cir. 1951), *cert. denied*, 342 U.S. 896 (1951), the Mississippi Constitution was amended to require that an applicant be able to read and copy any section of the constitution, and give a reasonable interpretation thereof to the registrar, and demonstrate to the registrar "a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government." (Miss. Const. § 244).

**Response:**

The defendants admit that *Peavy v. Cox* was decided in 1951, and the defendants further admit that in 1954 the Mississippi Constitution was amended as stated above. However, the defendants deny any causal connection between the two events.

**Request No. 63:**

Mississippi has in the past used such devices as the literacy test, the poll tax and the white primary to exclude its black citizens from participation in the electoral process. Indeed, until passage of the Voting Rights Act in 1965, use of racially discriminatory tests and devices effectively excluded blacks in Mississippi from exercise of the franchise.

**Response:**

Admitted.

**Request No. 64:**

"An issue [in the 1966 congressional redistricting process] proponents had hoped to keep 'under wraps' to shelter the far-reaching aspects of the [Representative Kenneth Williams] bill was opened on the floor by two opponents. It was the obvious five-way split of the Negro population to minimize its influence at the polls. Although that was an obvious purpose of the realignment of the counties in the Williams bill proponents had sought to keep it from arising on the floor." Memphis *Commercial Appeal*, 1/16/66.

**Response:**

Admitted.

**Request No. 65:**

**Request No. 66:**

The following colloquy took place on the House floor in 1966 during considerations of H.B. No. 63. Rep. Odie Trenor asked: "Did the Negro situation enter in this redistricting plan?" When he got no reply, he said "we all know the Negro situation was the main factor." Rep. Thompson McLellan of Clay said that they were moved so there shall not be a majority of certain groups in the district. This was patently drawn in a manner to devalue the vote of a cetain group of people. A news article explained that "legislators frequently refrain from using the word 'Negroes' and refer to Negroes as 'a certain group' ". Jackson *Clarion-Ledger*, 1/14/66. Jackson *Clarion-Ledger*, 1/19/66.

**Response:**

Admitted.

...

Respectfully submitted,

**Edwin Lloyd Pittman, Attorney General**
**State of Mississippi**

Richard G. Jones
Special Assistant Attorney General

Robert E. Sanders
Special Assistant Attorney General

T. Hunt Cole, Jr.
Special Assistant Attorney General
By _____
Robert E. Sanders.

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

## APPENDIX K

**U.S. Constitution, Fourteenth Amendment:**

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**U.S. Constitution, Fifteenth Amendment:**

§1. The right of citizens of the United States to vote shal not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

**28 U.S.C. § 1341. Taxes by States.**

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

**42 U.S.C. § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political

subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

**42 U.S.C. § 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court**

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standards, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced wihout such proceeding if the qualification, prerequisite, stan-

dard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

**MISS. CONST., ART. 4, § 70 (1972)**

No revenue bill, or any bill providing for assessments of property for taxation, shall become a law except by a vote of at least three-fifths of the members of each house present and voting.

**MISS. CONST., ART. 4, § 112 (1972)**

Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. Property shall be assessed for taxes under general laws, and by uniform rules, and in proportion to its value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for paticular species of property belonging to persons, corporations, or associations not situated wholey in one county. But all such property shall be assessed in proportion to its value, and no county, or other taxing authority, shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county. But the legislature may provide a special mode of assessment, fixing the taxable year, date

of the tax lien, and method and date of assessing and collecting taxes on all motor vehicles.

**MISS. CONST., ART. 15, § 273 (1972)**

Whenever two thirds of each house of the Legisature, which two thirds shall consist of not less than a majority of the members elected to each house, shall deem any change, alteration, or amendment necessary to this Constitution, such proposed amendment, change or alteration shall be read and passed by two-thirds vote of each house, as herein provided: public notice shall then be given by the secretary of state at least thirty days preceding an election, at which the qualified electors shall vote directly for or against such change, alteration or amendment, and if more than one amendment shall be submitted at one time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately; and, notwithstanding the division of the Constitution into sections, the Legislature may provide in its resolution for one or more amendments pertaining and relating to the same subject or subject matter, and may provide for one or more amendments to an article of the Constitution pertaining and relating to the same subject or subject matter, which may be included in and voted on as one amendment; and if it shall appear that a majority of the qualified electors voting directly for or against the same shall have voted for the proposed change, alteration or amendment, then it shall be inserted as a part of the Constitution by proclamation of the Secretary of State certifying that it received the majority vote required by the Constitution; and the resolution may fix the date and direct the calling of elections for the purposes thereof.

**SENATE CONCURRENT RESOLUTION NO. 519**

A CONCURRENT RESOLUTION PROPOSING AN AMENDMENT TO SECTION 112, MISSISSIPPI CONSTITUTION OF 1890, TO PROVIDE FOR THE CLASSIFICATION OF PROPERTY FOR AD VALOREM TAX PURPOSES; TO AUTHORIZE THE LEGISLATURE TO ESTABLISH ASSESSMENT RATIOS FOR UP TO FOUR CLASSIFICATIONS OF PROPERTY; AND FOR RELATED PURPOSES.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, TWO-THIRDS OF THE SENATE AND HOUSE OF REPRESENTATIVES CONCURRING

THEREIN, WHICH TWO-THIRDS CONSISTS OF NOT LESS THAN A MAJORITY OF THE MEMBERS ELECTED TO EACH HOUSE, That the following amendment to the Mississippi Constitution of 1890 be submitted to the qualified electors of the state for ratification or rejection at an election to be held on the first Tuesday after the first Monday of November, 1982:

Amend Section 112, Mississippi Constitution of 1890, to read as follows:

**Section 112.** Taxation shall be uniform and equal throughout the state. All property not exempt from ad valorem taxation shall be taxed at its assessed value. Property shall be assessed for taxes under general laws, and by uniform rules, and in proportion to its true value according to the classes defined herein. The Legislature may, by general laws, exempt particular species of property from taxation, in whole or in part.

The Legislature shall provide, by general laws, the method by which the true value of taxable property shall be ascertained; provided however, in arriving at the true value of Class I property, the appraisal shall be made according to current use, regardless of location. The Legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations or associations not situated wholly in one county. But all such property shall be assessed in proportion to its value according to its class, and no county, or other taxing authority, shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county. The Legislature may provide a special mode of assessment, fixing the taxable year, date of the tax lien, and method and date of assessing and collecting taxes on all motor vehicles.

The assessed value of property shall be a percentage of its true value, which shall be known as its assessment ratio. The Legislature shall establish, by general laws, by a three-fifths (3/5) vote of each House, the assessment ratio on each class of property as defined herein, which ratio shall be uniform throughout the state upon the same class of property, provided that the assessment ratio of any one (1) class

of property shall not be more than double the assessment ratio on any other class of property. For purposes of assessment for ad valorem taxes, taxable property shall be divided into four (4) classes as follows:

Class I. Real property, except for real property included in Class IV.

Class II. Personal property, except for motor vehicles and personal property included in Class IV.

Class III. Motor vehicles.

Class IV. Public utility property, which is owned or used by public service corporations required by general laws to be appraised and assessed by the state; however, such property shall not include railroad and airline property or motor vehicles.

BE IT FURTHER RESOLVED, That the Secretary of State is hereby directed to give public notice of an election in the manner and for the time provided by Section 273, Mississippi Constitution of 1890; and an election is hereby called and fixed to be held on the first Tuesday after the first Monday in November, 1982, for the purpose of submitting this and other amendments to the Constitution to qualified electors of this state for approval or rejection, said election to be conducted and held as provided by law for statewide general elections.

**HOUSE CONCURRENT RESOLUTION NO. 41 (AS ADOPTED BY HOUSE AND SENATE)**

A CONCURRENT RESOLUTION PROPOSING AN AMENDMENT TO SECTION 112, MISSISSIPPI CONSTITUTION OF 1890, TO PRESCRIBE ASSESSMENT RATIOS FOR REVISED PROPERTY CLASSES; TO PROVIDE THAT THE ASSESSMENT RATIO ON ONE CLASS OF PROPERTY SHALL NOT BE MORE THAN THREE TIMES THE ASSESSMENT RATIO ON OTHER CLASSES OF PROPERTY; TO PROVIDE THAT THE LEGISLATURE MAY DENY OR LIMIT A COUNTY OR OTHER TAXING AUTHORITY THE RIGHT TO LEVY COUNTY AND/OR SPECIAL TAXES ON NUCLEAR-POWERED ELECTRICAL GENERATING PLANTS; TO AUTHORIZE THE LEGISLATURE TO PROVIDE FOR A SPECIAL MODE OF VALUATION, ASSESSMENT AND LEVY UPON NUCLEAR-POWERED ELECTRICAL

GENERATING PLANTS AND PROVIDE FOR THE DISTRIBUTION OF THE REVENUE DERIVED THEREFROM.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, TWO-THIRDS (2/3) OF THE HOUSE OF REPRESENTATIVES AND THE SENATE CONCURRING THEREIN, WHICH TWO-THIRDS (2/3) CONSISTS OF NOT LESS THAN A MAJORITY OF THE MEMBERS ELECTED TO EACH HOUSE, That the following proposed amendment to the Mississippi Constitution of 1890 be submitted to the qualified electors of the state for ratification or rejection at an election to be held on the first Tuesday after the first Monday of June 1986.

Amend Section 112, Mississippi Constitution of 1890, to read as follow:

"**Section 112.** Taxation shall be uniform and equal throughout the state. All property not exempt from ad valorem taxation shall be taxed at its assessed value. Property shall be assessed for taxes under general laws, and by uniform rules, and in proportion to its true value according to the classes defined herein. The Legislature may, by general laws, exempt particular species of property from taxation, in whole or in part.

The Legislature shall provide, by general laws, the method by which the true value of taxable property shall be ascertained; provided, however, in arriving at the true value of Class I and Class II property, the appraisal shall be made according to current use, regardless of location. The Legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations or associations not situated wholly in one (1) county. All such property shall be assessed in proportion to its value according to its class, and no county, or other taxing authority, shall be denied the right to levy county and/or special taxes upon such assessment as in other cases of property situated and assessed in the county, except that the Legislature, by general law, may deny or limit a county or other taxing authority the right to levy county and/or special taxes on nuclear-powered electrical generating plants. In addition to or in lieu of any such county and/or special taxes on nuclear-powered electrical generating plants, the Legislature, by general

law enacted by a majority vote of the members of each house present and voting, may provide for a special mode of valuation, assessment and levy upon nuclear-powered electrical generating plants and provide for the distribution of the revenue derived therefrom. The Legislature may provide a special mode of assessment, fixing the taxable year, date of the tax lien, and method and date of assessing and collecting taxes on all motor vehicles.

The assessed value of property shall be a percentage of its true value, which shall be known as its assessment ratio. The assessment ratio on each class of property as defined herein shall be uniform throughout the state upon the same class of property, provided that the assessment ratio of any one (1) class of property shall not be more than three (3) times the assessment ratio on any other class of property. For purposes of assessment for ad valorem taxes, taxable property shall be divided into five (5) classes and shall be assessed at a percentage of its true value as follows:

**Class I.** Single-family, owner-occupied, residential real property, at ten percent (10%) of true value.

**Class II.** All other real property, except for real property included in Class I and IV, at fifteen percent (15%) of true value.

**Class III.** Personal property, except for motor vehicles and for personal property included in Class IV, at fifteen percent (15%) of true value.

**Class IV.** Public utility property, which is property owned or used by public service corporations required by general laws to be appraised and assessed by the state or the county, excluding railroad and airline property and motor vehicles, at thirty percent (30%) of true value.

**Class V.** Motor vehicles, at thirty percent (30%) of true value.

The Legislature may, by general law, establish acreage limitations on Class I property.

BE IT FURTHER RESOLVED, That the Secretary of State is hereby directed to give public notice of an election in the manner and for the time provided by Section 273 of the Constitution, for the purpose of submitting this and other proposed amendments to the Constitution to the qualified electors of this state for ratification or rejection, such election to be conducted and held on the first Tuesday after the first Monday of June 1986,

in the manner provided by law for statewide general elections.

**Mississippi Code Ann. § 23-5-141 (1972). Further as to form of ballots; constitutional amendments, etc.**

Whenever the question of a constitutional amendment, or other question or matter admitting of an affirmative or negative vote, is submitted to a vote of the electors, the amendment, question, or matter, shall be printed on the official ballot, together with the names of the candidates, if any and also the words "for" and "against," to be so arranged by the proper officer that the voter can intelligently vote his preference, by making a cross mark (X) opposite the word indicating his preference. And immediately following the title of each office shall be printed the words "vote for one," or "vote for two," or more, according to the number to be elected.

**Mississippi Code Ann. § 23-5-203 (Supp. 1986). Elections to fill vacancies; how held.**

Except as otherwise provided by law, the first Tuesday after the first Monday in November of each year shall be designated the regular special election day and on that day, an election shall be held to fill any vacancy in county, county district, and district attorney elective offices.

All special elections, or elections to fill vacancies, shall in all respects be held, conducted and returned in the same manner as general elections, except that where no candidate receives a majority of the votes cast in such election, then a runoff election shall be held two (2) weeks after such election and the two (2) candidates who receive the highest popular votes for such office shall have their names submitted as such candidates to the said runoff and the candidate who leads in such runoff election shall be elected to the office. When there is a tie in the first election of those receiving next highest vote, these two (2) and the one receiving the highest vote, none having received a majority, shall go into the runoff election and whoever leads in such runoff election shall be entitled to the office.

In those years when the regular special election day shall occur on the same day as the general election, the names of candidates in any special election and the general election shall be placed on the same ballot, but shall be clearly distinguished as general election candidates or special election candidates.

At any time a special election is held on the same day as a party primary election, the names of the candidates in the special election may be placed on the same ballot, but shall be clearly distinguished as special election candidates or primary election candidates.

**Chapter 507, Mississippi Laws, 1986, House Bill No. 388.**

AN ACT TO AMEND SECTION 27-35-309, MISSISSIPPI CODE OF 1972, TO PROVIDE FOR PAYMENTS IN LIEU OF AD VALOREM TAXES UPON NUCLEAR GENERATING PLANT PROPERTY AND TO DISTRIBUTE SUCH PAYMENTS TO THE SITUS COUNTY AND MUNICIPALITY, IF APPLICABLE, AND TO COUNTIES AND MUNICIPALITIES WHERE ELECTRIC SERVICE FROM SUCH POWER PLANT IS RENDERED; TO AMEND SECTIONS 37-19-11 AND 37-19-37, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT A REDUCTION OF LOCAL SUPPLEMENT UNDER THE MINIMUM EDUCATION PROGRAM BECAUSE OF THE AD VALOREM TAX EXEMPTION OF NUCLEAR POWER PLANTS SHALL NOT RESULT IN LOSS OF STATE FUNDS; TO PROVIDE THAT THE MINIMUM LOCAL AD VALOREM TAX EFFORT FOR SUPPORT OF THE MINIMUM EDUATION PROGRAM REQUIRED OF A SITUS COUNTY SHALL NOT BE MORE THAN $200,000.00 FOR SCHOOL YEARS 1986-87 AND 1987-88; TO PROVIDE THAT THE SEVERANCE TAX DEDUCTION AGAINST THE STATE CONTRIBUTION TO THE MINIMUM EDUCATION PROGRAM SHALL BE PHASED IN WITH RESPECT TO CERTAIN COUNTIES WHERE IT DOES NOT CURRENTLY APPLY; AND FOR RELATED PURPOSES.

*Be it enacted by the Legislature of the State of Mississippi:*

**Section 1.** Section 27-35-309, Mississippi Code of 1972, is amended as follows:

27-35-309. (1) The State Tax Commission shall, if practicable, on or before the first Monday of June, and if impracticable, as soon thereafter as it can be done, in each year, make out for each county having any railroad, telegraph, sleeping car, palace car, dining car, express, gas (natural or artificial), street, suburban, and interurban railway (including motor bus companies operating as street cars) and pipeline company property therein; and any

telephone, waterworks or electric power and/or any electric light company property not situated wholly in one (1) county, therein, an assessment roll of such property, both real and personal, tangible and intangible, and the same may be in such forms as they may prescribe as nearly in conformity with ordinary assessment rolls as convenient and practicable. The State Tax Commission shall apportion the value of the property of all public utilities or other persons, companies, or associations assessed according to the provisions of this article, except as provided in subsection (3) of this section, as follows:

(a) When all the property of such public utility is located within the limits of a county, the assessed value thereof shall be apportioned by the State Tax Commission between the several municipalities, school districts, road districts, levee districts, and other taxing districts therein, in the proportion which the property located within the several municipalities, school districts, road districts, levee districts and other taxing districts in question, bears to the entire value of the property of such public utility, as ascertained and valued as herein provided, so that, to each municipality, school district, road district, levee district, and other taxing district contained therein there shall be apportioned such part of the entire valuation as will fairly equalize relative value of the property therein located, to the whole value thereof.

(b) When the property of such public utility is located in more than one (1) county in this state, the assessed value thereof shall be apportioned by the State Tax Commission between the several counties and the municipalities and taxing districts therein, in the proportion which the property located therein bears to the entire value of the property of such public utility as ascertained and valued, as herein provided, so that to each county and each municipality and taxing district therein, there shall be apportioned such part of the entire valuation as will fairly equalize the relative value of the property therein located to the whole value thereof.

(c) When the property of such public utility required to be assessed by the provisions of this article is located in more than one (1) state, the assessed value thereof shall be apportioned by the State Tax Commission in such manner as will fairly and equitably determine the principal sum for the value thereof in this state, and after ascertaining such value it shall be apportioned

by them as herein provided.

The assessment roll shall contain all the property of any such public utility, railroad, person, firm, or corporation and the value thereof, and so made that each county, municipality, and taxing district shall receive its just share of taxes proportionately to the amount of property therein situated.

(2) The assessment roll when made shall remain for one (1) month in the office of the State Tax Commission, and be for such time subject to the objections thereto which may be filed; but real estate belonging to railroads and which forms no part of the road, and is wholly disconnected from its railroad business, shall not be assessed on the rolls by the State Tax Commission, but shall be assessed as other real estate is assessed by the tax assessor of the county where situated.

(3) Any nuclear generating plant which is located in the state, which is owned or operated by a public utility rendering electric service within the state and not exempt from ad valorem taxation under any other statute and which is not owned or operated by an instrumentality of the federal government shall be exempt from county, municipal and district ad valorem taxes. In lieu of the payment of county, municipal and district ad valorem taxes, such public utility shall pay to the State Tax Commission a sum based on the assessed value of such nuclear generating plant in an amount to be determined and distributed as follows:

(a) The State Tax Commission shall annually assign an assessed value to any nuclear generating plant described in this subsection in the same manner as for ad valorem tax purposes by using accepted industry methods for appraising and assessing public utility property. The assessed value assigned shall be used for the purpose of determining the in-lieu tax due under this section and shall not be included on the ad valorem tax rolls of the situs taxing authority nor be subject to ad valorem taxation by the situs taxing authority nor shall be assessed value assigned be used in determining the debt limit of the situs taxing authority. However, the assessed value so assigned may be used by the situs taxing authority for the purpose of determining salaries of its public officials.

(b) On or before February 1, 1987, for the 1986 taxable year and on or before February 1 of each year thereafter, such utility shall pay to the State Tax Commission a sum equal to two percent

(2%) of the assessed value as ascertained by the State Tax Commission, but such payment shall not be less than Sixteen Million Dollars ($16,000,000.00) for any taxable year, all such payments in excess of Sixteen Million Dollars ($16,000,000.00) for any taxable year shall be paid into the General Fund of this state.

(c) After distribution of the payments as set forth in Section 2 of this act, the State Tax Commission shall distribute ten percent (10%) of the remainder of the payments to the General Fund of the state and the balance shall be distributed to the counties and municipalities in this state wherein such public utility renders electric service in the proportion that the amount of electric energy consumed by the retail customers of such public utility in each county, excluding municipalities therein, and in each municipality for the next preceding fiscal year bears to the total amount of electric energy consumed by all retail customers of such utility in the State of Mississippi for the next preceding fiscal year.

(d) No county, including municipalities therein, shall receive in excess of twenty percent (20%) of the funds distributed under paragraph (c) of this subsection.

(e) The revenues received by counties and municipalities under paragraph (c) of this subsection shall be included and considered as proceeds of ad valorem taxes for the purposes of the growth limitation on ad valorem taxes for the 1987 fiscal year and thereafter under Section 27-39-321 and 27-39-305.

**Section 2.** The in-lieu payments made to the State Tax Commission pursuant to Section 27-35-309(3)(b), excluding payments made in excess of Sixteen Million Dollars ($16,000,000.00) which are required to be paid into the General Fund of the state, shall be distributed by the State Tax Commission as follows:

(a) For fiscal year 1987, fifty percent (50%) of such payment shall be paid to the situs county wherein such nuclear generating plant is located;

(b) For fiscal year 1988, forty-five percent (45%) of such payment shall be paid to the situs county wherein such nuclear generating plant is located;

(c) For fiscal year 1989, forty percent (40%) of such payments shall be paid to the situs county wherein such nuclear generating

plant is located;

(d) For fiscal year 1990, thirty-five (35%) of such payment shall be paid to the situs county wherein such nuclear generating plant is located;

(e) For fiscal year 1991 and thereafter, thirty percent (30%) of such payment shall be paid to the situs county wherein such nuclear generating plant is located.

**Section 3.** Of the funds received pursuant to Section 2 of this act by a situs county wherein such nuclear generating plant is located, the board of supervisors of such situs county shall distribute ten percent (10%) of each payment, upon receipt, to the most populous incorporated municipality within the county; however, if such plant is located within a municipality, such payments which would otherwise be made to the situs county pursuant to Section 2 of this act shall be divided equally between the situs county and situs municipality.

**Section 4.** Of the funds retained by the situs county after the payment made pursuant to Section 3 of this act, not more than Five Million Five Hundred Thousand Dollars ($5,500,000.00) per year may be expended by the board of supervisors of the county for any purposes for which a county is authorized by law to levy an ad valorem tax, and any funds in excess of such amount shall be expended in accordance with Section 5 of this act.

**Section 5.** The board of supervisors of the situs county, upon receipt of the payments pursuant to Section 2 of this act less the payment made according to Section 3 of this act, shall pay all such funds in excess of Five Million Five Hundred Thousand Dollars ($5,500,000.00) to the governing authorities of the public school districts in such county in the proportion that the average daily attendance for the preceding scholastic year of each school district bears to the total average daily attendance of the county for the preceding scholastic year. Such funds may be expended only for the purposes of capital improvements to school facilities and only after plans therefor have been submitted to and approved by the Educational Finance Commission or its successor. The governing authorities of such school districts may borrow money in anticipation of receipt of payments pursuant to this section and the levying authority for the school district may issue negotiable notes therefor, for the purposes set forth

herein. Such loan shall be repaid from the payments received under this section by the governing authorities of the public school district.

**Section 6.** Section 37-19-11, Mississippi Code of 1972, is amended as follows:

37-19-11.No school district shall pay any teacher on the minimum foundation program less than the state minimum salary provided for in Section 37-19-7. No school district shall receive any funds under the provisions of this chapter for any school year during which the aggregate amount of local supplement as defined in Section 37-19-1 shall have been reduced below such amount for the previous year, however, where there has been a reduction in the number of teacher units in such district in such year, where there has been a reduction in the amount of federal funds to such district below the previous year, or where there has been a reduction in ad valorem taxes to such school district for the 1986-1987 school year below the amount for the previous year due to the exemption of nuclear generating plants from ad valorem taxation, pursuant to Section 27-35-309, the aggregate amount of local supplement in such district may be reduced proportionately without loss of funds under this chapter. No school district may receive any funds under the provisions of this chapter for any school year if the aggregate amount of support from ad valorem taxation shall be reduced during such school year below such amount for the previous year, however, where there is a loss in teacher units, or where there is or heretofore had been a decrease in the total assessed value of taxable property within a school district, the aggregate amount of such support may be reduced proportionately. Nothing herein contained shall prohibit any school district from adopting or continuing a program or plan whereby teachers are paid varying salaries according to the teaching ability, classroom performance and other similar standards.

**Section 7.** Section 37-19-37, Mississippi Code of 1972, is amended as follows:

37-19-37. (1) The total state funds needed annually by each county, excluding the separate school districts therein, for the support of the minimum education program shall be the cost of the minimum education program for that county as determined

in Section 37-19-3, less the minimum local ad valorem tax effort required of that county, as provided in Section 37-19-35, and less one-half (1/2) of all refunds of severance taxes made by the state to the county for the preceding year, provided, however, in the event that, during any county fiscal year, one-half (1/2) of all severance taxes returned or to be returned to such county from the State Tax Commission will be less than one-half (1/2) of all severance taxes returned to such county during the preceding fiscal year, the state funds for the support of the minimum education program shall be increased in the amount of such deficit. The foregoing provisions shall be fully applicable to the distribution of minimum education program funds to a district designated as a municipal separate or special municipal separate school district prior to July 1, 1986, which embraces an entire county, subject to the provisions of subsection (4) of this section. In any county wherein there is located a nuclear generating power plant on which a tax is assessed under subsection (3) of Section 27-35-309, the minimum local ad valorem tax effort required of the county for school year 1986-1987 and school year 1987-1988 shall not be more than Two Hundred Thousand Dollars ($200,000.00) per school year. In no case shall the total state funds provided in any year for the support of the minimum education program in any county be less than forty percent (40%) of the cost of the minimum education program for that county as determined by Section 37-19-3, and in the event the workings of this proviso should result in a lesser local contribution for the support of the minimum education program of the county than is otherwise required by this section, then the local funds otherwise required for the support of said minimum education program shall be reduced or eliminated in the following order of priority: (a) severance taxes; (b) the minimum local ad valorem tax effort.

(2) The total state funds needed annually by each separate school district for the support of the minimum education program in that district shall be the cost of the minimum education program for that district, as determined in Section 37-19-3, less the minimum local ad valorem tax effort required of that district, as provided in Section 37-19-35, and less than one-half (1/2) of all refunds of severance taxes made by the state to the municipality for the preceding year; provided, however, in the event that, during any municipal fiscal year, one-half (1/2) of all severance

taxes returned or to be returned to such municipality from the State Tax Commission will be less than one-half (1/2) of all severance taxes returned to such municipality during the preceding fiscal year, the state funds for the support of the minimum education program shall be increased in the amount of such deficit.

(3) The total state funds needed for the support of the minimum education program annually shall be the total of the amounts needed by all the counties and separate school districts in the state as provided in subsections (1) and (2) of this section.

(4) For any school district designated as a municipal separate or special municipal separate school district prior to July 1, 1986, which embraces an entire county, the following percentage reduction shall be substituted for the use of the ratio of one-half (1/2) as provided in subsection (1) hereinabove:

| Fiscal Year | Percentage to be Applied |
|---|---|
| 1987-1988 | 10% |
| 1988-1989 | 20% |
| 1989-1990 | 30% |
| 1990-1991 | 40% |
| 1991-1992 | 50% |

This subsection (4) shall stand repealed from and after July 1, 1992.

**Section 8.** This act shall take effect and be in force from and after its passage.

Approved: April 23, 1986

Supreme Court, U.S.
FILED
MAY 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1559

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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EDDIE BURRELL, *et al.*,
*Appellants*

v.

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, *et al.*,
*Appellees*

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**On Appeal from the United States District Court for the Southern District of Mississippi**

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## APPELLEES' MOTION TO AFFIRM OR DISMISS

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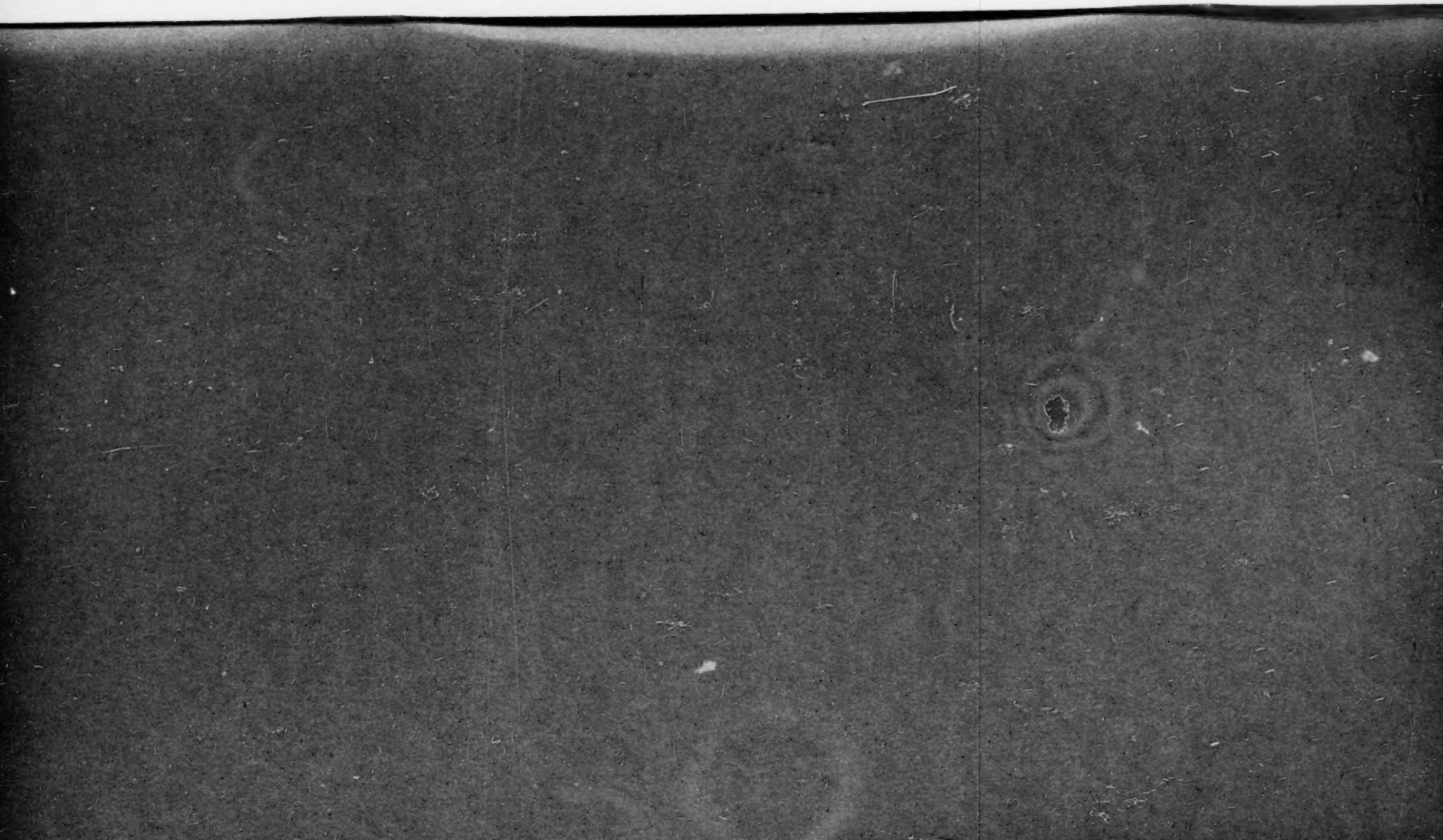

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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No. 86-1559

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EDDIE BURRELL, *et al.*,

*Appellants*

v.

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, *et al.*,

*Appellees*

---

**On Appeal from the United States District Court for the Southern District of Mississippi**

---

## APPELLEES' MOTION TO AFFIRM OR DISMISS

---

Pursuant to Rule 16.1, the appellees move to affirm the judgment of the district court on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as to need no further argument, or in the alternative, to dismiss the appeal for lack of jurisdiction as may be appropriate.

## STATEMENT OF THE CASE

A basic statement of the case, including a brief description of the tax legislation in question and the historical background and circumstances surrounding its passage, is set forth in the unreported opinion of the three-judge district court, App. A at 2a-4a. Specific aspects of the district court's rulings are discussed in the applicable section of the Argument portion of this Motion. Those sections correspond to the Questions Presented in the appellants' Jurisdictional Statement.

## ARGUMENT

### I. THE DISTRICT COURT'S REFUSAL TO ENJOIN OR VACATE THE ELECTION ON H.C.R. NO. 41 FELL SQUARELY WITHIN ITS REMEDIAL DISCRETION AS RECOGNIZED IN PRIOR § 5 DECISIONS OF THIS COURT.

In at least four opinions since 1969, this Court has considered the issue of an appropriate remedy in private actions for injuncitve relief brought under § 5 of the Voting Rights Act. *Allen v. State Board of Elections*, 393 U.S. 544, 571-572 (1969); *Perkins v. Matthews*, 400 U.S. 379, 395-397 (1971); *Berry v. Doles*, 438 U.S. 190 (1978); *NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 181-183 (1985). The action of the three-judge district court in this case falls squarely and manifestly within the controlling principles and guidelines established by those decisions of the Court, and in particular *Berry v. Doles*. To the extent that the appellants pose the argument that a district court must *always* enjoin an upcoming election, or subsequently set aside the results thereof, without the exercise of any equitable discretion whatsoever, such argument is plainly foreclosed by those cases. For the reasons set forth below, further briefing or argument regarding this question is not warranted.

A brief summary of the posture of the case and the remedial action taken below may prove helpful to the Court.

The property tax measure embodied in House Concurrent Resolution No. 41 was passed by the Mississippi Legislature on April 2, 1986. The substance of this proposed amendment to § 112 of the Mississippi Constitution of 1890 contained two aspects relating to ad valorem taxation: first, it modified the number of classes of property and assessment ratios for taxation purposes; and second, it specifically provided that the Legislature could deny or limit a situs county of other taxing authority the right

to levy ad valorem taxes upon a nuclear power plant and could instead establish an alternative mode of valuation, assessment, levy, and revenue distribution. In addition to these substantive provisions, H.C.R. No. 41, as provided for in § 273 of the Mississippi Constitution of 1890, also contained a "date of election" component which fixed the date for submission of the proposed measure to the voters of the State for ratification or rejection as June 3, 1986.[1]

On May 6, 1986, the Mississippi Attorney General submitted the date of the ratification election on H.C.R. No. 41 to the Justice Department for approval under § 5 and requested expedited consideration. On May 23, eleven days before the scheduled election, the appellants filed their initial complaint and a Motion for Preliminary Injunction in which they alleged that the date of election on H.C.R. No. 41 had not been approved under § 5 and requested that the district court enjoin the election. A three-judge district court was rapidly convened and an evidentiary hearing on the motion for preliminary injunction was conducted on May 30, 1986. In accordance with the analytical framework articulated in *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983),[2]

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[1] Section 273 of the Constitution states in part that the Legislature's concurrent resolution on a proposed amendment "may fix the date and direct the calling of elections for the purposes thereof." The June 3 date coincided with the Democratic party primary elections. Under Mississippi case law, the utilization of a date other than the November general elections was permissible, see *Barnes v. Barnett*, 129 So.2d 638 (Miss. 1961). As found by the district court, the reason for a June election date with respect to H.C.R. No. 41 was to avoid delaying the effective implementation of the general reclassification provisions of that amendment until the 1988 tax year if ratified.

[2] In a § 5 injunction action, the issues for determination by the district court as set forth in *Lockhart* are:

> (i) whether a change [is] covered by § 5, (ii) if the change is covered, whether § 5 approval requirements [have been] satisfied, and (iii) if the requirements [have not been satisfied], what relief [is] appropriate.

the district court in its May 30, 1986, bench opinion and written order on preliminary relief determined: (1) that although there was no "change" in an election statute regarding the date of election, the setting of a June, rather than a November, date of election for H.C.R. No. 41 in fact constituted a deviation from the predominant past practice of holding ratification elections in November,[3] and thus was a change in a voting "practice" covered by § 5; (2) that although the date of election had been submitted to the Justice Department on May 6, 1986, for preclearance, the Attorney General had not indicated whether he would object to, or approve, the June date; and (3) that under the circumstances, the June 3 ratification election would not be enjoined, but that the implementation of H.C.R. No. 41 would be enjoined until the June date had been approved by the Attorney General or by the United States District Court for the District of Columbia pursuant to § 5.[4] App. E at 37a; F at 42a.

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[3] The appellants suggest in a footnote that the district court should be summarily reversed with respect to the § 5 date-of-election issue as to the 1982 tax amendment embodied in S.C.R. No. 519. Juris. Stat. at 7 n.6. That suggestion illustrates the unsupported nature of many claims and positions asserted by appellants throughout their brief. The 1982 election was *in fact conducted in November*, in accordance with the predominant practice found by the district court. See S.C.R. No. 519, App. at 73a, 75a. There was no "change" for § 5 purposes.

[4] As even a casual perusal of the district court's opinion and order on the motion for preliminary relief reveals, the Court took into account a number of factors in refusing to enjoin the holding of the June 3 election. *See University of Texas v. Camenisch*, 451 U.S. 390 (1981). In choosing an appropriate remedy, the district court observed, *inter alia*, that it was presented with no evidence of any racial implications regarding the June election date, that a delay in the ratification election would inevitably result in a delay in the implementation of the property tax provisions of H.C.R. No. 41, that the § 5 violation was not "flagrant" or due to any "deliberate evasion" on the part of the appellee, that the state had an arguable reason that the change was not subject

On July 7, 1986, the Attorney General approved the June 3 election date under § 5, and on July 10, 1986 the district court dissolved its preliminary injunction of the implementation of H.C.R. No. 41. By the time the action came on for an expedited trial on the merits in November 1986, the plaintiffs had added, among other things, a claim that the June date of election violated the substantive provisions of § 2 of the Voting Rights Act, and the request for relief had necessarily changed into a request that the results of the June election be set aside or vacated. In its opinion after the trial on the merits, the three-judge court observed that any remaining issues regarding relief under § 5 would be considered in conjunction with the alleged violation of § 2, and it ultimately concluded that the June date-of-election did not in fact violate § 2. It thus refused to set aside the June election.

The appellants' basic premise as set forth in their Jurisdictional Statement, i.e., that a district court which has determined that a change in voting procedures for which § 5 approval has not yet been obtained has no discretion to fashion any remedy except to enjoin or set aside an election conducted thereunder—is flatly contrary to opinions of this Court. In *Perkins v. Matthews*, 400 U.S. 379 (1971), a municipality expanded its boundaries and changed from a ward system of municipal elections to an at-large system without submitting the changes for approval under § 5. A three-judge district court refused the plaintiffs' request to enjoin elections to be conducted under the new system, and the municipality held the elections. On appeal to this Court, the plaintiffs specifically argued that the elections should be set aside. 400 U.S. at 396. The Court refused to establish a per se rule

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to preclearance, and that the rights of the plaintiffs could be adequately protected by enjoining the implementation of H.C.R. No. 41 until such time as the date of election was properly approved under § 5.

which would require a district court to set aside an election whenever a violation of § 5 was demonstrated:

> [W]e recognize that, in determining the appropriate remedy, other factors may be relevant, such as the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by § 5. In certain circumstances, for example, it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming.

The flexibility to fashion an appropriate equitable remedy for § 5 violations was further recognized in *Berry v. Doles*, 438 U.S. 190 (1978), the decision which controls this case and which compels the summary affirmance of the district court regarding this issue. In *Berry*, the State of Georgia sought to conduct elections in 1976 for a county board pursuant to a 1968 statute which had not been submitted for approval under § 5 and which in essence changed the terms of office for members of the board. The district court refused to enjoin the upcoming elections.[5] After the elections were held, the three-judge court found a violation of § 5 and enjoined enforcement of the 1968 statute until such time as defendants effected compliance with § 5. The district court, however, rejected the plaintiffs' request to set aside the elections, noting "the rather technical changes" made in the election law and "the apparent lack of any discriminatory purpose or effect surrounding the use of the law in the 1976 elections." 438 U.S. at 191.

On appeal, this Court affirmed the district court's refusal to set aside the election. Accordingly, in the context of *fashioning a remedy* for a § 5 violation, this Court has, contrary to the position taken by appellants in their

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[5] See 438 U.S. at 197 (Powell, J., concurring).

Jurisdictional Statement, refused to disturb the judgment of a district court based in part on the lack of apparent racial implications of the change. However, since the change in law had still not been submitted for approval under § 5, the Court remanded to the district court for the entry of an order which would allow the appellee 30 days in which to submit the change to the appropriate authorities for approval:

> We conclude that the requirement of federal scrutiny imposed by § 5 should be satisfied by appellees without further delay. Accordingly, we adopt the suggestion of the United States that the District Court should enter an order allowing appellees 30 days within which to apply for approval of the 1968 voting change. *If approval is obtained the matter will be at an end.*

438 U.S. at 192-193 (emphasis supplied).

Here, as in *Berry*, the district court enjoined implementation of the subject measure (H.C.R. No. 41) until the date the ratification of election had received approval of the proper authorities under § 5; indeed, the further affirmative remedy imposed in *Berry* was unnecessary in the instant case because the state had *in fact already submitted the June date of election for approval prior to the litigation.*[6] Most importantly, the Attorney General *in fact approved* the date of election under § 5 on July 7, 1986. As stated in *Berry*, this put the matter "at an end" for § 5 purposes. Had the Attorney General instead objected to the date of the election, and approval could not be subsequently obtained from the United States District Court for the District of Columbia, the question of a remedy in the district court would have

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[6] To reiterate, H.C.R. No. 41 with a June 3, 1986, date-of-election component was passed on April 2, 1986. The Mississippi Attorney General submitted the date of election for approval on May 6; the complaint and motion for injunction were filed on May 23 and were heard by the Court on May 30.

been quite different. Those, however, are not the facts confronting the Court in this case.

Most recently, in *NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 181-183 (1985), the Court again reaffirmed the basic vitality of the *Berry* remedy, but ordered that a modified, more stringent, *Berry* remedy be imposed to fit the different posture of the case. In *Hampton County*, the district court erred by concluding that a change in candidate filing periods along with a changed date-of-election were not covered by the approval requirements of § 5, and by further concluding in the alternative that the change had been submitted and had received approval under § 5. The Court held that the appropriate remedy under those circumstances was (1) to allow the appellee 30 days to submit the change for approval; (2) if approval was not forthcoming, to set aside the election; and (3) if approval was obtained from the Attorney General, the district court then "should determine, in the exercise of its equitable discretion" whether the election should stand. 470 U.S. at 182-183. As made plain in footnote 36 of the Court's opinion, the additional post-approval exercise of the district court's remedial discretion was required because in *Hampton*, unlike *Berry*, the district court had never "reached the question of an appropriate remedy" and had "never engaged in the equitable weighing process necessary to determine whether failure to submit a covered change requires that an election be set aside." 470 U.S. at 183 n.36. The three-judge court in the instant case, as in *Berry*, had considered and reached the question of an appropriate remedy.

The district court's remedial action in this § 5 case fell squarely within the parameters established by this Court, and for the foregoing reasons, the question sought to be posed by appellants is plainly insubstantial and does not warrant further argument.

## II. THE DISTRICT COURT CORRECTLY HELD THAT THE SUBSTANTIVE PROVISIONS OF H.C.R. NO. 41 AND H.B. NO. 388 DO NOT CONSTITUTE A "STANDARD, PRACTICE, OR PROCEDURE WITH RESPECT TO VOTING" WITHIN THE MEANING OF § 5 OF THE VOTING RIGHTS ACT.

By its express terms, § 5 of the Voting Rights Act requires designated states and political subdivisions to submit only a proposed change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" to federal authorities for advance review prior to the implementation of same. 42 U.S.C. § 1973c.

The appellants in their Third Amended Complaint alleged in conclusory fashion that the *substantive provisions* of the property tax amendment in H.C.R. No. 41 and the Grand Gulf taxation measure passed by the Legislature as H.B. No. 388 constituted a "standard, practice, or procedure with respect to voting" within the meaning of § 5. In essence, they contended that the substantive "withdrawal" of the authority of a situs county (i.e. Claiborne County) to levy ad valorem taxes on a nuclear power plant (Grand Gulf) and the substitution of an in lieu system of levy, assessment, and tax revenue distribution effectuated by these measures were thus covered under § 5 and were required to be submitted for preclearance. The three-judge district court held as a matter of law that neither H.B. No. 388 nor H.C.R. No. 41 constituted voting practices covered by § 5.[7]

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[7] While the district court orders are cursory, App. A at 6a; G at 47a, this issue was extensively briefed by both appellants and appellees in regard to appellees' motion for summary judgment in the lower court. There, as here, the appellants relied on their view of the *Hardy* and *Horry County* cases, and the appellees relied on the same basic arguments now presented to the Court in this motion to affirm.

Given the nature of the tax measures at issue, the district court's ruling is so plainly correct that further argument before this Court is not warranted. Put simply, neither the statutory language nor any opinion of this Court suggests that the substantive text of these property tax and tax-distribution measures constitute, either directly or indirectly, a change in a "standard, practice, or procedure *with respect to voting*" as required for coverage under § 5. Appellees do not question, and did not question before the district court, the general proposition that this statutory language is to be given a broad construction. *E.g., Allen v. Board of Elections*, 393 U.S. 544, 567 (1969) (Congress intended to give language "broadest possible scope"); *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 37-40 (1978). No case, however, has held or suggested that the term "standard, practice, or procedure with respect to voting" is simply open-ended and can be permissibly applied to require designated jurisdictions to submit any and all enactments, regardless of substance, to federal authorities for preclearance. The substance of the tax provisions at issue have no nexus to voting.

In this regard, the construction of the scope of § 5 by the Attorney General takes on special significance. As the Court has repeatedly observed, the Attorney General's interpretation of § 5 is entitled to considerable deference because of his extensive role in drafting the statute and explaining its operation to Congress. *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 179, n.29 (1985); *Dougherty County*, 439 U.S. at 39. With respect to the type of changes that affect voting and are covered by § 5, the Attorney General has set forth an extensive list of examples in 28 C.F.R. § 51.12 (1986).[8] That list

[8] By final rule published January 6, 1987, 28 C.F.R. Part 51 was revised by the Department of Justice. 52 Fed. Reg. 486. Section 51.12 (1986) was renumbered in the revised rule and currently appears as § 51.13 without any change in content. See 52 Fed. Reg. at 492.

of examples is set forth in the appellees' Supplemental Appendix A, SA-1. While the Attorney General's list of "changes" that are subject to § 5 does not purport to be all-inclusive, it does provide clear guidance to designated jurisdictions as to those matters upon which preclearance must be sought, and presumptively represents the intent and understanding of Congress as to those "standards, practices or procedures with respect to voting" that are subject to the Act. The substantive provisions of H.C.R. No. 41 and H.B. No. 388 *simply do not fit into any* of the examples given in the Regulation, either logically, practically, or otherwise.

The district court cases upon which appellants rely in their Jurisdictional Statement at pp. 12-13 are not, as appellants suggest, "precedent" in any meaningful sense, nor do they in fact conflict with the decision of the district court with regard to the enactments at issue here. The broad language quoted from *Horry County v. United States*, 449 F.Supp. 990, 995 (D.D.C. 1978) is dictum.[9]

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[9] *Horry County* involved the implementation of "home rule" legislation in a South Carolina county. Prior to the legislation, the Governor appointed the members of the county commission and all major governmental functions were conducted by the county's local legislators; after the change, a council-administrator form of government was established, with an elected "county council" which had a different number of members and different terms of office. 490 F.Supp. at 993-994. The district court observed in dictum that "an alternate reason for subjecting the Horry County governing body to Section 5 preclearance is that the change involved reallocates governmental powers among elected officials voted upon by different constituencies." 449 F.Supp. at 995. The basic holding of the case, however, is that the change in the *method of selection* of county officials from appointed to elected was a voting standard, practice, or procedure covered by § 5. This basic holding was a clearly understandable corollary to the principle that a change in selection method from elected to appointed is covered by § 5 and was a proposition implicitly supported in *Allen v. State Board of*

Moreover, *Hardy v. Wallace*, 603 F.Supp. 174 (M.D. Ala. 1985) is a case that, by its own term, is *sui generis*, see 603 F.Supp. at 179.

In *Hardy*, the Alabama legislature passed an act which authorized pari-mutual betting on dog racing in Greene County, a county with a predominantly black population, and which authorized, *inter alia*, the creation of a three-member racing commission which would be appointed by the local state legislators that represented the county in the legislature. This 1975 Act was conditioned upon an affirmative vote by the citizens of Greene County and received approval in a referendum election held in the county. Several years later, after the Alabama legislature was reapportioned so that it was likely that black candidates would be elected to the legislature from Greene County, the Alabama legislature in 1983 passed an act which amended the 1975 Act to provide that the Governor, rather than the local legislative delegation, would appoint the members of the county racing commission. Both the 1975 Act and the 1983 Act were submitted by Alabama to the Attorney General under § 5. After initially interposing an objection, *see* 603 F. Supp. at 179, the Attorney General upon reconsideration withdrew his objection and held that the transfer of appointment power from the local legislators to the Governor was not a change in a standard, practice or procedure with respect to voting and that the Attorney General was accordingly without authority to review the change. 603 F.Supp. at 181. For the amalgam of reasons set forth therein, the district court nevertheless concluded that the change was covered under § 5.

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*Elections*, 393 U.S. 544 (1969), and directly supported by the Attorney General's interpretation of § 5. The "alternate reason" given by the district court, for which no direct authority in support was cited, was not essential to the judgment and, to appellees' knowledge, has not been followed or endorsed by any federal court other than *Hardy, supra*.

The legal analysis and reasoning employed by the district court in *Hardy* is curious and appears to be flawed.[10] It is unnecessary, however, to dissect that decision—which itself refused to espouse any far-reaching view of the law and was decided "within the ambit of its peculiar facts"—to observe the material distinctions that exist as compared to the instant case. In *Hardy*, there was a transfer of *appointment power* from the locally-elected legislative delegation to the governor. Prior to the change, the voters of Greene County had an indirect say-so, through their local legislative delegation, as to *who* would serve in the county racing commissioner positions. In this sense, *Hardy* represents an extension, correct or incorrect, of the line of cases that hold that a change from elected to appointed officials, or from appointed to elected officials, are practices affecting voting within the scope of § 5. In the instant case, neither H.B. No. 388, nor H.C.R. No. 41 makes *any change whatsoever in who will be appointed or elected to any position in Claiborne County*, or the method of selection, by appointment or otherwise, for any such position. To the extent that H.B. No. 388 withdraws from the supervisors of a situs county the authority to tax a nuclear power plant and substitutes an in lieu system

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[10] The district court, for example, placed considerable emphasis upon the "alternate reasoning" given by the District of Columbia court in *Horry County* because of the defense afforded "*agencies* charged with the administration of the Voting Rights Act." 603 F.Supp. at 177 (emphasis supplied). As numerous decisions of this Court make clear, however, it is the *Attorney General's* administrative interpretation of the scope of § 5 which is accorded great deference due to his extensive role in "drafting the statute and explaining its operation to Congress." *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 131 (1978). The judges of the United States District Court for the District of Columbia obviously played no such role. Moreover, notwithstanding the Attorney General's specific withdrawal of his objection to the subject legislation, the district court in *Hardy* ruled, without explanation, that the "denial of § 5 coverage" by the Attorney General did not constitute "compliance with § 5" or "preclearance by the Attorney General." 603 F.Supp. at 177, and proceeded to second

of levy and distribution, it nevertheless does not change *any aspect* of the other powers exercised by the duly elected officials of that county or in any manner infringe upon the voting rights of the residents. Thus, this case is plainly distinguishable, both under the rationale of the district court in *Hardy* and under the Attorney General's interpretation of the scope of § 5 as expressed in *Hardy*, *see* 603 F.Supp. at 181.

A second factor crucial to the district court's conclusion in *Hardy* was the fact that the scheme of indirect control over the appointees to the county racing commission had been initially put in place by a vote of the county residents themselves and had been reversed by the change. 603 F.Supp. at 179; at 175. In the instant case, the historical scheme of ad valorem property taxation by counties is a creature of state law, passed by legislators elected on a statewide basis. No county, including Claiborne, has had veto or approval power over whether it wished to be a part of the overall scheme, nor has any countywide referendum ever been held in such regard.

In summary, the substance of the property tax enactments challenged in this case do not fall within the relevant language of § 5 as construed by the Court, the Attorney General, or any other authoritative source. Even within its proper purview, i.e. changes in laws or procedures "with respect to voting", this Court and various justices thereof have repeatedly observed that the advance review requirement of § 5 is an extraordinary remedy and represents a serious intrusion into state sovereignty and a substantial departure from ordinary concepts of our system of federalism. *See McCain v. Lybrand*, 465 U.S. 236, 244-245 (1984); *Georgia v. United States*, 411 U.S. 526, 542, 545 (1973) (opinions of White, J., and Powell, J., dissenting); *City of Rome v. United States*,

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guess his determination. Such judicial review of the Attorney General's actions is, of course, precluded under the scheme of § 5. See *Morris v. Gressette*, 432 U.S. 491 (1978).

446 U.S. 156, 201-202 (opinion of Powell, J., dissenting); *Board of Commissioners of Sheffield*, 435 U.S. at 140 (opinion of Stevens, J., dissenting). While the facial validity of § 5 has been upheld, *see City of Rome*, defendants submit that an application of those requirements to the substantive tax measures embodied in H.C.R. No. 41 and H.B. No. 388 would raise serious questions of the constitutionality of § 5 as applied, and would make it virtually impossible for a designated jurisdiction, which can now basically rely upon the Attorney General's regulations for guidance, to determine which enactments, if any, do not require advance federal review.

Appellees submit the district court's ruling is plainly correct and that it does not implicate or contravene any line of precedent of this Court regarding the scope of § 5. No patent conflict currently exists among the lower federal courts which would warrant or require guidance from the Court at this juncture. Appellees submit that the question is insubstantial and that summary affirmance is appropriate.

## III. THERE WAS NO PROOF OF A "CHANGE" IN THE STATE ELECTION LAW OR VOTING PRACTICE REGARDING THE CONTENTS OF BALLOTS UTILIZED IN SOME COUNTIES ON H.C.R. NO. 41, NOR DID THE DEFENDANT STATE OFFICIALS SEEK TO ADMINISTER ANY CHANGE WITHIN THE MEANING OF § 5.

It is well-settled that some abstract violation of a state election law or voting procedure does not, in and of itself, constitute a "change" within the scope of § 5 so as to be subject to the advance review requirements of that particular section to the Voting Rights Act. *Perkins v. Matthews*, 400 U.S. 379, 394-395 (1971); *City of Lockhart v. United States*, 460 U.S. 125, 132-133 (1983). Unlike other sections of the Voting Rights Act, e.g. § 2 of the Act, 42 U.S. § 1973, 42 U.S.C. § 1971(a), traditional challenges under the Fifteenth Amendment, or various state election remedies, § 5 focuses upon whether there

has been in fact a change in the election law or practices that are different from that which were "in force or effect on November 1, 1964"—the date that serves as a benchmark for comparison purposes.[11] *Id.; United States v. Board of Supervisors*, 429 U.S. 642, 646 n.3 (1978) (§ 5 is addressed "only to voting procedures that were not in effect on November 1, 1964."). In determining whether a covered change has occurred for § 5 purposes, state law may in some circumstances be relevant,[12] or, as indicated by *Perkins* and *Lockhart*, may be totally irrelevant; the true test is a comparison of the election procedure that "would have been followed if the election had been held on [November 1, 1964]" and that which in fact was followed. *Perkins*, 400 U.S. at 394. Moreover, the change in a law or practice with the respect to voting must be one which, under the express language of § 5, a designated state or a political unit within that state[13] "shall enact or seek to administer. . . ." 42 U.S.C. § 1973c; see *United States v. Saint Landry Parish Sch. Bd.*, 601 F.2d 859, 863 (5th Cir. 1979).

The foregoing basic principles, which are central to the scheme of § 5 and to the scope of its reach, are dispositive of the question sought to be raised by appellants in their Jurisdictional Statement at pp. 14-16.

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[11] As Judge Goldberg of the Fifth Circuit wrote in *United States v. St. Landry Parish Sch. Bd.*, 601 F.2d 859 (5th Cir. 1979): "Section 5 has its own political cosmos, but it does not possess a universality with respect to every electoral aberration."

[12] A post-coverage amendment to a pre-1964 law with respect to voting, for example, may itself indisputably constitute the change. This is not that kind of case.

[13] *See United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 127 (1978) (§ 5 applies "not only to governmental entities formally acting in the name of the State, but also to those political units that may exercise control over critical aspects of the voting process").

In the district court, appellants' § 5 claim in this regard derived from Count IV of their Second Amended Complaint; that count alleged that at the June 1986 Special Election on H.C.R. No. 41, the "ballots and ballot labels in use on *certain* voting machines and electronic voting systems in *certain* counties did not contain the entire text of H.C.R. No. 41 . . . but rather only included the title of H.C.R. No. 41" (emphasis supplied). The complaint further alleged, in conclusory § 5 terminology, that this deviated from a custom or practice required by state law and that "defendants Allain, Pittman, Molpus, and State Board of Election Commissioners administered the change" without having having first obtained preclearance

The relevant state law of Mississippi regarding the content of ballots, either as approved by the Attorney General or as existing on November 1, 1964, and unchanged at the date of the election on H.C.R. No. 41 to that date,[14] is tedious but is relatively clear in context. Put simply, some provisions of state law regarding the preparation and content of ballots are directed to the State Board of Election Commissioners and in particular the Secretary of State, and define their specific duties regarding same; the vast majority of provisions of state law regarding ballots are directed to local county election officials who actually conduct elections. With respect to the ballot, Miss. Code Ann § 23-5-3 describes the composition of the county boards of election commissioners and provides that it

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[14] There was no claim in the district court that any formal change in the written laws of the state regarding ballots by way of amendment, repeal, etc., had occurred and had not been submitted for preclearance. It should be noted, however, for the Court's information, that the *entire* election code of Mississippi has been totally revamped and, as approved by the Attorney General in December 1986, became effective as state law on January 1, 1987. Accordingly, the statutes cited in this section refer to the code sections as they existed prior to January 1, 1987, regardless of the tense used in the text. All statutes referred to in this section are set forth in Supplemental Appendix B, SA-3 through SA-13, in their pre-January 1, 1987 form.

"shall be the duty of the chairman [of the county election commissioners] to have the official ballot printed and distributed at each general or special election." Miss. Code Ann. § 23-5-139 states that the "size, print, and quality of the *paper of the official ballot* is left to the discretion of the officer charged with printing the official ballot" and further provides that it is the duty of a *state* official, the secretary of state, to furnish the designated commissioner of each county a *sample* of the official ballot . . . the *general form of which shall be followed as nearly as practicable.* . . ." (emphasis supplied). The next adjacent section, § 23-5-141, provides that a proposed constitutional amendment "shall be printed on the official ballot" so that the voter can mark his preference for or against the amendment, and § 23-5-142 further defines the duties of the secretary of state to require that that state official "shall have printed on the election ballot the title of the concurrent resolution adopted by the legislature and the proposed change in the Mississippi Constitution of 1890."

In summary, the basic electoral scheme regarding ballots and their contents set forth in Chapter 5 of Title 23 clearly contemplates only the use of *paper* ballots. See §§ 23-5-139 and 23-5-151. With respect to proposed constitutional amendments, the secretary of state prepares a sample official ballot which contains the title and entire text of the proposed amendment, and forwards the sample official ballot to the responsible county election commissioners, who print and distribute the "official" paper ballot and who should follow the general form of the sample "as nearly as practicable."

The *only testimony* presented to the district court at trial regarding this claim *affirmatively indicates that the defendant secretary of state complied to the letter with the foregoing specific duties imposed upon him by state law with regard to the special election on H.C.R. No. 41*, and there is no evidence that he or any other defendant state official, administered, or sought to administer, these

state laws in any changed manner whatsoever. The *sole evidence* presented at trial in this regard was the uncontradicted testimony of Constance Slaughter-Harvey, the Assistant Secretary of State for Elections, whose testimony is set forth in its entirety in the Supplemental Appendix, and the Master's Report as to what in fact occurred in the 33 counties which had the capability to utilize various types of voting machines or devices in the June 1986 election in H.C.R. No. 41. That report reveals that in those various counties either (1) a summary of H.C.R. No. 41 appeared on the ballot *and* the entire text was posted conspicuously, or (2) the entire text was included on the ballot. App. A at 5a. In the context of § 5, the Master's Report, *standing alone*, was meaningless since the appellants failed at trial to present any proof which identified any change in fact from pre-November 1964 practice regarding ballots on proposed amendment or from any practice subsequently approved under § 5. *Perkins*, *supra*. The district court's judgment should be summarily affirmed on this basis.

Moreover, the district court's judgment is supportable under *St. Landry Parish*, *supra*, at least insofar as that case recognizes that a designated state or political subdivision thereof does not necessarily seek to administer a change within the meaning of § 5 each time a local election worker or official deviates in isolated fashion from election laws or procedures which have themselves been approved under § 5. 601 F.2d at 861-865. In this regard, the appellants' current assertion that "the failure to use proper ballots in Mississippi has been 'widely administered with at least the implicit approval of the State' over a number of years", Juris. Stat. at 15, is *patently without factual support* in either the record [15] or in the district court's opinion.

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[15] Notwithstanding the lack of evidence in the record, appellants suggestion that there has been a failure to use "proper" ballots "over a number of years" further underscores their misconception of the role of § 5. In *Perkins*, for example, it is clear that if the City of Canton had in 1969 and thereafter continued to conduct its

Finally, the instant appeal is a particularly inappropriate vehicle in which to resolve appellants' purported "conflict" between the Fifth Circuit opinion in *St. Landry Parish* and *Henderson v. Graddick*, 641 F.Supp 1192 (M.D. Ala. 1986), in that: (1) the district court in the instant case did not specifically find that *any defendant state official* had violated, or affirmatively urged a violation of, state law regarding the content of the ballot on H.C.R. No. 41; (2) notwithstanding the district court's cursory observation that "state law required that the proposed constitutional amendment be printed in full on the ballot", App. 5a, no provision of state law expressly and specifically precluded county election officials[16] in those counties where voting machines and devices are used from placing the title summary of H.C.R. No. 41 on the physical ballot with the entire text posted conspicuously. The most plausible construction of state law suggests that these actions of the responsible county officials were not impermissible under the relevant statutes.[17] Under § 23-7-1 of the article dealing with voting machines, for ex-

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elections pursuant to its pre-1964 practices, even though such practices would have been in contravention of existing state law, there would have been no change to trigger § 5 scrutiny. 400 U.S. at 394-395.

[16] No county election commissioner was made a party defendant in this action.

[17] The relevant Mississippi statutes regarding the use of voting machines or electronic voting systems are set forth in the Supplemental Appendix at ——. Under these laws, either as approved by the Attorney General or as existing on November 1, 1964, and unchanged at the time of the election, counties in Mississippi have the option of purchasing or renting various types of "voting machines" or "electronic voting systems" which may be used exclusively or in combination with paper ballots at all elections. § 23-7-3, 23-7-5 (voting machines); §§ 23-7-303, 23-7-307 (electronic voting systems). In summary, both of these articles supplement the basic election law which contemplates the use of paper ballots, § 23-7-9 and § 23-7-303, both define the "ballot" in its various aspects where voting machines and electronic systems are in use, § 23-7-1 and § 23-7-301, and both require by reference that the

ample, the term "official ballot" is defined to mean the "printed strips of cardboard containing the names of the candidates nominated and *a statement* of the questions submitted." (emphasis supplied). In any event, the best that can be said in favor of appellants is that state law is "unclear", *cf. Lockhart.* In this case, it provides a particularly hazy backdrop by which to measure the conduct or practices of the responsible county election officials, none of whom were party defendants.

In summary, the benchmark pre-November 1964 practices of the responsible county election officials regarding the contents of the physical ballot on proposed amendments in counties where voting devices are utilized were not established; there was no proof that the defendant state officials administered or sought to administer any change in practice; and the instant appeal provides no occasion for this Court to resolve any issue of substantial significance. Further argument is not warranted.

## IV. THE DISTRICT COURT CORRECTLY FOUND THAT THE DATE OF ELECTION OF H.C.R. NO. 41 DID NOT IN FACT CAUSE A DENIAL OF ACCESS TO THE POLITICAL PROCESS.

With respect to plaintiffs' claim under § 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, the district court found as a fact that the state practice complained of—the June 1986 date of ratification election on H.C.R. No. 41—did not cause a denial to plaintiffs of equal access to the political process by virtue of a shortened period in

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chairman of the various county boards of election commissioners are responsible for the preparation of the official ballot to be used upon the machine or in conjunction with an electronic voting system, 23-7-21 and § 23-7-311; see also § 23-5-3 and § 23-5-123. Moreover, both articles regarding voting machines and electronic systems recognize that space limitations may dictate the physical characteristics and composition of the ballot and ballot labels where devices are used, § 23-7-9 and § 23-7-309.

which to campaign against the measure.[18] The lack of a campaign and accompanying information to the electorate concerning H.C.R. No. 41 was not in fact attributable to state action regarding the election date, but instead was "self imposed" due to a deliberate decision on the part of plaintiffs not to campaign or attempt to educate voters. App. 27a-29a. Cf. *Rosario v. Rockerfeller*, 410 U.S. 752, 758 (1973). The district court's finding was based on causation, rather than on any theory or finding of "estoppel." The district court further found that no campaign to educate voters would have been waged by plaintiffs even if the election had been held in November, that there was no evidence of a campaign by any white group on H.C.R. No. 41, that if any misinformation as to the substantive effects of the tax amendment went to the voters it went to all, both black and white, and that the percentage of black voters participating in the election was equal to, if not higher than, the percentage of such white voters.[19] App. A at 26a-29a. The district court carefully assessed the relevant circumstances surrounding the use of a June date of election of H.C.R. No. 41 and determined that it did not in fact constitute an "episode" of racial discrimination in voting under § 2 as amended.[20]

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[18] The district court expressed severe reservations about the plaintiffs' to launch this claim under § 2. App. A at 17a-21a. Given all the circumstances, that determination was incorrect, and the Court should dismiss the question posed for lack of jurisdiction.

[19] Moreover, as the Court noted with respect to the testimony of plaintiffs' expert, a higher percentage of blacks voted for H.C.R. No. 41 than did whites. App. A at 21a.

[20] The 1982 amendment to § 2 was aimed primarily, though not exclusively, at state-imposed permanent structural barriers, such as multi-member districts, which may result in the *dilution* of black voting strength under the totality of the circumstances so that the opportunity of a cohesive group of minority voters to participate in the electoral process and to elect a candidate of their choice is impaired. The well-known *White-Zimmer* factors of proof were adopted by Congress in the 1982 amendment in order to deal with those permanent structural barriers. In § 2 parlance, the plaintiffs' challenge in this case was directed exclusively toward an "episode"

The district court, rightly or wrongly, accepted the appellant's *theory* of the case as stating a claim under § 2 as amended. In essence, the sole argument now presented to this Court by appellants is that the district court, having accepted their view of the law, was somehow obligated to ignore the concrete facts that were presented to it and to find in plaintiffs' favor. The appellants have already had one "main event" with respect to their strained interpretation of the facts, and under the appropriate appellate review function they are not entitled to another. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). Appellees respectfully submit that further argument in this Court of the fact-specific issue faced by the court below is unwarranted.

## V. THE COURT LACKS JURISDICTION TO REVIEW THE DISTRICT COURT'S FINDINGS AS TO THE APPELLANTS' FOURTEENTH AMENDMENT CLAIMS, AND, IN THE ALTERNATIVE, THOSE FINDINGS ARE NOT CLEARLY ERRONEOUS.

In Section V of their Jurisdiction Statement, Juris. Stat. at 22, the appellants assert that the three-judge district court "erred in failing to find a discriminatory purpose on the part of the State in enacting and administering" the various tax measures challenged under the Equal Protection Clause. A jurisdictional bar, however, not directly attacked by appellants in their Jurisdictional Statement, precludes the Court's review of the merits of the question posed. Moreover, even if the initial jurisdictional problem is ignored—and Appellees submit it should not be—the district court's findings of fact on the merits can-

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of alleged discrimination in voting under § 2, rather than a permanent structural barrier. *See generally, Welch v. McKenzie*, 765 F.2d 1311, 1315-1316 (5th Cir. 1985). As observed in the Senate Committee Report on the 1982 amendment, an alleged "episodic" violation "would not necessarily involve the same [White-Zimmer] factors of proof as the courts have utilized when dealing with permanent structural barriers." Senate Report, Vol. 2 1982 U.S. Code Cong. and Adm. News at p. 207.

not be said to be clearly erroneous under the appropriate appellate review function as defined in *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

Prior to the trial of this cause, the appellees asserted, *inter alia*, that the Tax Injunction Act, 28 U.S.C. § 1341, precluded that district court from exercising subject-matter jurisdiction over the substantive fourteenth amendment equal protection challenges to S.C.R. No. 519, H.C.R. No. 41, and H.B. No. 388 In its November 17, 1986, Order on appellees motion for summary judgment, App. at 47a, the district court held this question under advisement and carried it with the trial on the merits. The parties thus litigated at the trial the appellants' fourteenth amendment claims that the tax measures were enacted for a racially-discriminatory purpose. Subsequent to trial, the district court ruled against the appellants on alternative bases. It held (1) that the Tax Injunction Act did indeed bar the plaintiff's fourteenth amendment claims and those claims would be dismissed for lack of jurisdiction, and (2) that in the alternative, as to the merits, there was no intent to discriminate on the basis of race with respect to the subject legislation. App. at 33a, 15a. *See, e.g., Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981); *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); *United Gas Pipe Line Co. v. Whitn[illegible]*, 595 F.2d 323 (5th Cir. 1979).

In their Jurisdictional Statement, the appellants do not set forth the district court's ruling on jurisdiction as one of the "substantial" questions upon which further review by this Court is warranted. In a footnote, they do mention in cursory fashion that the district court erred in applying the Tax Injunction Act because "neither the [district court] nor the State has ever identified" a "plain, speedy and efficient" remedy in the state court. Juris. Stat. at 28 n.34. The district court in fact cited in its opinion *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973), which reviews Missis-

sippi law and hold that the courts of that state provide such a remedy for Fourteenth Amendment claims, *id.* at 28-29. There is no argument whatsoever presented to this Court that the lower court was wrong in this holding. Absent some articulated claim of error as to the threshold issue of jurisdiction, the Court should not consider the merits of the question the appellants seek to present.

Given the foregoing posture, it is unnecessary at this juncture to reargue the evidence as if this Court sits as the initial trier of fact or to correct every overstatement [21] tossed off by appellants in their Jurisdictional Statement. The opinion of the three-judge district court speaks for itself. Therein, the district court reviewed the evidence concerning the basic historical background, the objective circumstances, and legislative process regarding the ad valorem taxation of Grand Gulf, summarized the live testimony of witnesses and of key legislators who were instrumental in the tax legislation, studied deposition testimony, and by its own description, "plowed through tons . . . of paper." [22] App. 2a-3a, 9a-16a, 29a-30a. It found as a fact that there was *no* racially dis-

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[21] For example, Appellants suggest at Juris. Stat. 24 that Claiborne County was "handed the smallest feasible share of the smallest feasible pie" under H.B. No. 388. The fact of the matter, of course, is that under H.B. No. 388, Claiborne County as situs county receives the lion's share of all in lieu tax revenue generated by the Grand Gulf Plant. Under the terms of the statute, the utility pays not less than $16,000,000 to the State Tax Commision, and of those monies, Claiborne County receives 50 percent off the top for fiscal year 1987, phased down to 30 percent for fiscal year 1991 and thereafter. In addition, Claiborne County, like the other counties in the MP&L service district, also receives a share of the remainder based on a formula for energy consumed. See App. at 81a-83a. It is accordingly more accurate to say that the massive tax windfall for Claiborne County occasioned by the location of Grand Gulf has been reduced to a more modest windfall.

[22] Those "tons of paper" included, among other things, the reports of legislative committees, statistical information provided the legislature by the State Tax Commission, and a transcript of the legislative debates on the measures.

criminatory intent or purpose with regard to the enactments. See *Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252 (1977). That basic finding of course, is subject under F.R.Civ.P.Rule 52(a) to the deferential clearly erroneous standard of appellate review. *Anderson v. Bessemer City*, 470 U.S. 564, 573-575 (1985); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 287-290 (1982). As set forth in *Anderson*, "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." 470 U.S. at 574. The district court's view of the evidence with respect to the issue of alleged discriminatory intent was manifestly "permissible", and appellants have presented no substantial argument that it was not. This is particularly true in light of the fact that a substantial number of the counties in the service district which will benefit from the distribution under H.B. No. 388 themselves have, like Clairborne County, a black majority population. E.g., Sunflower (62.0%), Leflore (59.1%), Humphreys (65.6%), Jefferson (82.0%).

Further, with respect to the Appellant's contention that the district court somehow failed to follow *Hunter v. Underwood*, 471 U.S. 222 (1985), only two brief observations need be made. First, *Hunter*, itself a fact-specific case, does not purport to direct the district courts as to *how* to find the facts, or what specific conclusions they should ultimately reach, in any of the wide variety of cases in which discriminatory motivation is the touchstone issue of fact. The Court has, in *Arlington Heights*, set forth illustrations of the subjects and materials that may be helpful to the district courts in conducting this inquiry, and it is beyond question in the instant case that the district court had before it and considered those subjects and materials, including the live testimony of key legislators, see *Anderson*, 470 U.S. at 574-575 Second, once the district court had reviewed all the evidence presented in the case and made its bottom-line finding that there was no

racial motivation with regard to the enactments,[23] there was no further analysis for it to undertake; this was not a case in which the district court found a mixed-motive with regard to the enactments so that further scrutiny would be required. *Cf., Arlington Heights*, 429 U.S. at 270 n.21 and accompanying text.

In summary, the jurisdictional issue should preclude the Court's review of the merits of the question the Appellants seek to pose, and that question is itself lacking in such substantiality as to require further briefing or argument.

## VI. THE COURT LACKS JURISDICTION TO REVIEW THE DISTRICT COURT'S PURPORTED RELIANCE ON "POLITICAL CLOUT" AS A LEGITIMATE STATE INTEREST, AND IN ANY EVENT THE QUESTION APPELLANTS SEEK TO POSE IS PATENTLY INSUBSTANTIAL.

Finally, appellants assert that the district court erroneously found "political clout to be a legitimate state interest under the Equal Protection Clause." For the same reasons set forth above at pp. 24-25, the district court's alternate ruling as to the applicability of the Tax Injunction Act, basically unchallenged by appellants before this Court, precludes review of this issue. In any event, the question presented is patently insubstantial. First, the appellants mischaracterize the district court's opinion. Second, the cases relied upon by appellants, *Zobel v. Williams*, 457 U.S. 55 (1982), and *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) are manifestly inapposite. *Zobel* involved a dividend-distribution law which rewarded citizens based on length of residence in the state, and *Metropolitan* involved a domestic preference tax imposed on out-of-state insurance companies. Neither involved the type of property tax and tax revenue distribution meas-

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[23] *Cf., United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 715-716 (1983).

ures found to be rational by the district court in the instant case. *See generally, Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1979); *see also Salsburg v. Maryland*, 346 U.S. 545, 550 (1954) (Equal Protection Clause relates to "equality between persons as such rather than equality between areas").

## CONCLUSION

For the reasons set forth above, appellees respectfully submit that the questions posed are so unsubstantial as to require no further argument, or, in the alternative, that the Court lacks subject matter jurisdiction to review the question. Accordingly, appellees request that the judgment of the district court be summarily affirmed or that this appeal be dismissed as may be appropriate. Moreover, to the extent that the Court deems that any question requires further argument, appellees would request that any notation of probable jurisdiction limit or specify the issues that the Court will hear on the merits.

Respectfully submitted,

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# SUPPLEMENTAL APPENDIX

## SUPPLEMENTAL APPENDIX A

### 28 C.F.R. § 12 (1986)

**§ 51.12 Examples of changes.**

Changes affecting voting include, but are not limited to, the following examples:

(a) Any change in qualifications or eligibility for voting.

(b) Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting.

(c) Any change with respect to the use of a language other than English in any aspect of the electoral process.

(d) Any change in the boundaries of voting precincts or in the location of polling places.

(e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).

(f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

(g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

(h) Any change in the eligibility and qualification procedures for independent candidates.

(i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices).

(j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.

(k) Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of Section 5.

## SUPPLEMENTAL APPENDIX B

## MISSISSIPPI CODE ANNOTATED (1972)*

### § 23-5-3. Election and term of office of county election commissioners—qualification of candidates—authority of board of supervisors—organization and duties of commissioners.

At the general election in 1968, and every four (4) years thereafter, there shall be elected five (5) commissioners of election for each county, whose terms of office shall commence on the first Monday of January following their election and who shall serve for a term of four (4) years. Each of the commissioners, before acting, shall take and subscribe the oath of office prescribed by the constitution and file the same in the office of the clerk of the chancery court, there to remain. While engaged in their duties, the commissioners shall be conservators of the peace in the county, with all the duties and powers of such.

The qualified electors of each supervisors district shall elect, at the general election in 1980 and every four (4) years thereafter, in their district one (1) commissioner of election. No more than one (1) commissioner shall be a resident of and reside in each supervisors district of the county; it being the purpose of this section that the county board of election commissioners shall consist of one (1) person from each supervisors district of the county and that each such commissioner be elected from the supervisors district in which he resides.

Candidates for county election commissioner shall qualify by filing with the clerk of the board of supervisors of their respective counties a petition personally signed by not less than fifty (50) qualified electors of the supervisors district in which they reside, requesting that they be a candidate, not less than sixty (60) days before the

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* See Motion to Affirm, p. 17 at n.14.

election and unless such petition is filed within said time, their names shall not be placed upon the ballot. All candidates shall declare in writing their party affiliation, if any, to the board of supervisors, and such party affiliation shall be shown on the official ballot.

The petition shall have attached thereto a certificate of the registrar showing the number of qualified electors on each petition, which shall be furnished by the registrar on request. The board shall determine the sufficiency of the petition, and if the same shall contain the required number of signatures and be filed within the time required, the president of the board shall certify the same to the chairman or secretary of the county election commission and the names of the candidates shall be placed upon the ballot for the ensuing election. No county election commissioner shall serve or be considered as elected unless and until he has received a majority of the votes cast for the position or post for which he is a candidate. If such majority vote is not received in the first election, then the two (2) candidates receiving the most votes for each position or post shall be placed upon the ballot for a second election to be held two (2) weeks later in accordance with appropriate procedures followed in other elections involving runoff candidates.

Upon taking office, the count board of election commissioners shall organize by electing a chairman and a secretary.

It shall be the duty of the chairman to have the official ballot printed and distributed at each general or special election.

**§ 23-5-123. Official ballot; expense of printing.**

The ballots in all elections shall be printed and distributed at the public expense, and shall be known as "official ballots." The expense of printing such ballots shall be paid out of the county treasury, except that in municipal elections such expenses shall be paid by the respective cities, towns, and villages.

**§ 23-5-139. Arrangement of names on ballots; sample ballots.**

The arrangement of the names of the candidates, and the order in which the titles of the various offices shall be printed, and the size, print, and quality of paper of the official ballot is left to the discretion of the officer charged with printing the official ballot; but the arrangement need not be uniform. It is the duty of the secretary of state, with the approval of the governor, to furnish the designated commissioner of each county a sample of the official ballot, not less than fifty (50) days prior to the election, the general form of which shall be followed as nearly as practicable: provided that in all primary elections the names of the candidates for each office separate shall be arranged alphabetically.

**§ 23-5-141. Further as to form of ballots; constitutional amendments, etc.**

Whenever the question of a constitutional amendment, or other question or matter admitting of an affirmative or negative vote, is submitted to a vote of the electors, the amendment, question, or matter, shall be printed on the official ballot, together with the names of the candidates, if any, and also the words "for" and "against," to be so arranged by the proper officer that the voter can intelligently vote his preference, by making a cross mark (X) opposite the word indicating his preference. And immediately following the title of each office shall be printed the words "vote for one," or "vote for two," or more, according to the number to be elected.

**§ 23-5-142. Further as to the form of ballots; title of legislative concurrent resolution.**

The secretary of state shall have printed on the election ballot the title of the concurrent resolution adopted by the legislature and the proposed change in the Mississippi Constitution of 1890.

**§ 23-5-151. Voting; ballot to be marked with ink, and folded.**

On receiving his ballot, the voter shall forthwith go into one of the voting compartments, and shall there prepare his ballot by marking with ink on the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled or by filling in the name of the candidate substituted in the blank space provided therefor, and marking a cross (X) opposite thereto, and likewise a cross (X) opposite the answer he desires to give in case of an election on a constitutional amendment or any other question or matter. As an alternative method, a voter may, at his option, prepare his ballot by marking with ink or indelible pencil in the appropriate margin or place a check, in the form of and similar to a "V", opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate substituted in the blank space provided therefor, and marking a check, in the form of and similar to a "V", opposite thereto, and likewise a check, in the form of and similar to a "V", opposite the answer he desires to give in case of an election on a constitutional amendment or other question or matter, either of which methods of marking, whether by a cross (X) or by a check in the form of and similar to a"V", is authorized, except that the voter must use either one of said methods throughout his ballot. Before leaving the voting compartment, the voter shall fold his ballot without displaying the markings thereof, but so that the words "official ballot," followed by the designation of the election district and the date of the election, shall be visible to the officers of the election. He shall then cast his ballot by handing the same to one of the managers of the election for deposit in the ballot box; this he shall do without undue delay, and as soon as he has voted, he shall quit the inclosed place at once. A voter shall not be allowed to occupy a voting compartment already occupied by another

voter, nor any compartment longer than ten minutes, if other voters be not waiting, nor longer than five minutes if other voters be waiting. A person shall not be allowed in the room in which the ballot boxes, compartments, tables, and shelves are, except the officers of the election and those appointed by them to assist therein.

**§ 23-7-1. Definitions.**

The list of candidates used or to be used on the front of the voting machines for an election district in which a voting machine is used pursuant to law shall be deemed official ballots under this article. The word "ballot" as used in this article (except when reference is made to irregular ballots) means that portion of the cardboard or paper or other material within the ballot frames containing the name of the candidate and the designation of the party by which he was nominated, or a statement of a proposed constitutional amendment, or other question or proposition with the word "yes" for voting for any question or proposition, and the word "no" for voting against any question. The term "question" shall mean any constitutional amendment, proposition, or other question submitted to the voters at any election. The term "official ballot" shall mean the printed strips of cardboard containing the names of the candidates nominated and a statement of the questions submitted. The term "irregular ballot" shall mean a vote cast, by or on a special device, for a person whose name does not appear on the ballots. The term "voting machine custodian" shall mean the person who shall have charge of preparing and arranging the voting machine for elections. The term "protective counter" shall mean a separate counter built into the voting machine which cannot be reset, which records the total number of movements of the operating lever. The term "officials in charge of the election" shall mean the state election commissioners, the county election commissioners, the county executive committee, the municipal election commissioners, the municipal executive committee, or any

other official or officials empowered by law or who may in the future be empowered by law to hold an election.

**§ 23-7-3. Purchase or rental of voting machines—requirements.**

The board of supervisors of any county in the State of Mississippi and the governing authorities of any municipality in the State of Mississippi are hereby authorized and empowered, in their discretion, to purchase or rent any voting machine or machines which shall be so constructed as to fulfill the following requirements: It shall secure to the voter secrecy in the act of voting; it shall provide facilities for voting for all candidates of as many political parties or organizations as may make nominations, and for or against as many questions as submitted; it shall, except at primary elections, permit the voter to vote for all the candidates of one party or in the part for the candidates of one or more other parties; it shall permit the voter to vote for as many persons for an office as he is lawfully entitled to vote for, but not more; it shall prevent the voter from voting for the same person more than once for the same office; it shall permit the voter to vote for or against any question he may have the right to vote on, but no other; it shall be so constructed and equipped with devices or attachments as to comply with the "single shot" provisions of the Mississippi election laws, whenever and wherever such provisions are applicable; if used in primary elections, it shall be so equipped that the election officials can lock out all rows except those of the voter's party by a single adjustment on the outside of the machine; it shall correctly register or record, and accurately count all votes cast for any and all persons, and for or against any and all questions; it shall be provided with a "protective counter" or "protective device" whereby any operation of the machine before or after the election will be detected; it shall be provided with a counter which shall show at all times during an election how many persons have voted; it shall be provided with a

mechanical model, illustrating the manner of voting on the machine, suitable for the instruction of voters; it may also be provided with one device for each party, for voting for all the presidential electors of that party by one operation, and a ballot therefor containing only the words "Presidential Electors For" preceded by the name of that party and followed by the names of the candidates thereof for the offices of President and Vice President, and a registering device therefor which shall register the vote cast for said electors when thus voted collectively; provided, however, that means shall be furnished whereby the voter can cast a vote in part for the candidates for presidential electors of one party, and in part for those of one or more other parties or in part or in whole for persons not nominated by any party.

**§ 23-7-5. Discretionary use of machines—use of combinations of voting systems in same election.**

Whenever the board of supervisors of any county or the governing authorities of any municipality shall purchase or rent voting machines that meet the requirements of this article, such voting machines may be used at all elections held in such county or municipality, or in any part thereof, for voting, registering and counting votes cast at such elections. In providing voting machines, the board of supervisors is hereby empowered to purchase or rent voting machines for each voting precinct in the entire county, including those located within the municipality, or, in the discretion of the board, voting machines may be purchased or rented only for those voting precincts located outside the limits of the municipalities located in said county. The board of supervisors of any county and the governing authorities of any municipality may jointly purchase or rent voting machines for all of the voting precincts in the entire county. Whenever voting machines have been purchased or rented by either the board of supervisors or the governing authorities of a municipality, for use at voting precincts within the county or within the

municipality, said voting machines may be used at said voting precincts in all elections, and the officials in charge of the election to be held shall cause the voting machines to be prepared and used at such election as provided for herein. Voting machines of different kinds may be adopted for different counties within the state.

**§23-7-9. Ballots—arrangement of names.**

All ballots for use in voting machines shall be furnished by the same officer whose duty it is to furnish regular ballots and shall be printed on paper or clear white material, of such form and size as will fill the ballot frames of the machines, in plain color type as large as the space will reasonably permit. The names of the candidates for each office shall be arranged on each voting machine, either in columns or horizontal rows; the caption of the various ballots on said machines shall be so placed on said machines as to indicate to the voter what key lever or other device is to be used or operated in order to vote for the candidate or candidates of his choice. The order of the arrangement of parties and of candidates shall be as now required by law.

**§ 23-7-21. Official ballots, preparation of.**

Official ballots of the form and description set forth in this article for use upon voting machines shall be prepared and furnished in the same manner, at the same time, and be delivered to the same officials as now provided by law.

**§ 23-7-301. Definitions.**

As used in this article, unless otherwise specified:

"Automatic tabulating equipment" includes apparatus necessary to automatically examine and count votes as designated on ballots or ballot cards and tabulate the results.

"Ballot card" means a tabulating card on which votes may be recorded by means of punching or marking.

"Ballot labels" means the cards, papers, booklets, pages, or other material, containing the names of offices and candidates and the statements of measures to be voted on, which are placed on the voting device.

"Ballot" means a paper ballot on which votes are recorded, or alternatively may mean ballot cards and ballot labels.

"Counting center" means one or more locations used for the automatic counting of ballots.

"Electronic voting system" means a system in which votes are recorded on a paper ballot or ballot cards by means of marking or punching, and such votes are subsequently counted and tabulated by automatic tabulating equipment at one or more counting centers.

"Voting device" means an apparatus which the voter uses to record his votes by marking or punching a hole in a paper ballot or tabulating card, which votes are subsequently counted by electronic tabulating equipment.

**§ 23-7-303. Authorization of acquisition and use of electronic voting system.**

The board of supervisors of any county in the State of Mississippi and the governing authorities of any municipality in the State of Mississippi are hereby authorized and empowered, in their discretion, to purchase or rent voting devices and automatic tabulating equipment used in an electronic voting system which meets the requirements of section 23-7-305, and may use such system in all or a part of the precincts within its boundaries, or in combination with paper ballots in any election or primary. It may enlarge, consolidate or alter the boundaries of precincts where an electronic voting system is used. The provisions of this article shall be controlling with respect to elections where an electronic voting system is used, and

shall be liberally construed so as to carry out the purpose of this article. The provisions of the election law relating to the conduct of elections with paper ballots, insofar as they are applicable and not inconsistent with the efficient conduct of elections with electronic voting systems, shall apply. Absentee ballots shall be voted as now provided by law.

**§ 23-7-307. Equipment may be used at all elections.**

Whenever the board of supervisors of any county or the governing authorities of any municipality shall purchase or rent voting equipment that meets the requirements of this article, such voting equipment may be used at all elections held in such county or municipality, or in any part thereof, for voting, registering, or counting votes cast at such elections as provided by section 23-7-5, Mississippi Code of 1972, with respect to voting machines.

**§ 23-7-309. Ballots and ballot labels.**

Ballots and ballot labels shall, as far as practicable, be in the same order of arrangement as provided for paper ballots, except that such information may be printed in vertical or horizontal rows, or in a number of separate pages which are placed on the voting device. Ballot labels shall be printed in plain clear type in black ink and upon clear white materials of such size and arrangement as to fit the construction of the voting device. Arrows may be printed on the ballot labels to indicate the place to punch the ballot card, which may be to the right or left of the names of candidates and propositions. The titles of offices may be arranged in vertical volumns on in a series of separate pages, and shall be printed above or at the side of the names of candidates so as to indicate clearly the candidates for each office and the number to be elected. In case there are more candidates for an office than can be printed in one column or one ballot page, the ballot or ballot label shall be clearly marked that the list of candidates is continued on the following column or page, and,

so far as possible, the same number of names shall be printed on each column or page. The names of candidates for each office shall be printed in vertical columns or on separate pages, grouped by the offices which they seek. In partisan elections, the party designation of each candidate, which may be abbreviated, shall be printed following his name.

Two sample ballots, which shall be facsimile copies of the official ballot or ballot labels, and instructions to voters, shall be provided for each precinct and shall be posted in each polling place on election day.

Sample ballots may be printed on a single page or on a number of pages stapled together. A separate write-in ballot, which may be in the form of a paper ballot, card or envelope in which the voter places his ballot card after voting, shall be provided if required to permit voters to write in the title of the office and the name of a person not on the printed ballot for whom he wishes to vote.

**§ 23-7-311. Ballots and supplies.**

The official ballots, ballot labels, ballot cards, sample ballots, and other necessary forms and supplies of the form and description required by this article or required for the conduct of elections with an electronic voting system shall be prepared and furnished by the same officials, in the same manner and time, and delivered to the same officials as provided by law with respect to paper ballots. If ballot cards are used, each card shall have a serially numbered stub which shall be removed by an election officer before being deposited in the ballot box, and suitable envelopes shall be provided to enclose the voted ballot card when it is returned to the election officers for deposit in the ballot box.

**SUPPLEMENTAL APPENDIX C**

**Tr. 533-54**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

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Civil Action No. J86-0373(L)

EDDIE BURRELL, *et al.*,
*Plaintiffs*

vs.

WILLIAM A. ALLAIN, *et al.*

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TRANSCRIPT OF TRIAL

VOLUME III

Jackson, Mississippi
November 24, 25 and 26, 1986
Honorable E. Grady Jolly, Jr.
Honorable Tom S. Lee
Honorable Henry T. Wingate

APPEARANCES:

For the Plaintiffs:

Mr. Michael B. Wallace
Mr. Clifton Hodge
Ms. Jean H. Sansing

For the Defendants:

Mr. Robert Sanders
Mr. T. Hunt Cole
Mr. Richard G. Jones

* * * *

CONSTANCE SLAUGHTER HARVEY,
first being sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. COLE:

Q State your name, please.
A Constance Slaughter Harvey.
Q Where do you live, Ms. Harvey?
A I live in Forest.
Q Have you always lived in Forest?
A For the better part of my life, yes.
Q Where did you attend high school?
A E. T. Hawkins in Forest.
Q And did you attend college?
A Yes. I attended Tougaloo College in Tougaloo.
Q And did you have any further educational training?
A I graduated from the University of Mississippi School of Law in January of 1970.
Q And I believe it's correct that you had the honor of being the first black female graduate of the law school at Ole Miss. Is that correct?
A If that's an honor, yes.
Q Now, what is your present occupation?
A My occupation is Assistant Secretary of State for Public Lands and Elections.
Q And let me ask you this: Had you had any prior experience in state government?
A Yes. I was director of the Governor's Office of Human Development from February 1980 to January 4th of 1984.
O Now, tell the court what you do in your capacity as Assistant Secretary of State for Elections.
A I am responsible for coordinating the Secretary of State's responsibilities under the statutes as they relate to elections. That primarily would include serving as his liaison with the State Board of Election Commissioners and receiving certifications from local entities regarding

elections. Additionally, we are responsible for receiving and verifying fee-paid forms that come into our office and providing technical assistance to the public and public officials as that assistance would relate to elections.

Q Does the Secretary of State's office have any duties with respect to the ballot?

A Yes, sir. As a member of the State Board of Election Commissioners, the Secretary of State has been designated informally, I believe, as the secretary to the Commission; and in that role, we do the actual work, along with the Attorney General's office. We prepare the agenda with the approval of the Attorney General's office and the Governor's office. We prepare and bring to the meetings, after having made appropriate copies, the affidavits and certifications that are required to be filed in certain cases. We make certain that the commission has all the information that it needs in order to make an intelligent decision.

Q What do you do with respect to the ballot when a proposed constitutional amendment has been adopted by the legislature?

A Well, the procedure now is somewhat different than it was for the June 3rd election.

Q Let's focus our attention on generally what the Secretary of State's office does in that regard before we turn to June 3rd.

A Generally we get copies—attested copies of the concurrent resolution and have those copies prepared for review by the Election Commission. We contract with printers as necessary to make certain that they are able to print on a timely basis and get those particular amendments—concurrent or proposed amendments out to the public and out to public officials as mandated by law.

Q And what is it actually that the Secretary of State's office prepares with respect to the ballot on a proposed constitutional amendment?

A We prepare a copy of the proposed amendment.

Q Yes.

A And we also prepare instructions to the Circuit Clerks and Election Commissioners, with the assistance of the Attorney General's office.

Q Now, is that what's call the sample official ballot?

A Yes, sir.

Q Explain to the court how that process works.

A Well, it's a very simple process. The legislature passes the resolution. It is then sent to the documents division of the Secretary of State's office for official record-keeping. When we get ready to have a meeting of the State Board of Election Commissioners, we ask for a copy of the original resolution. We get it xeroxed, and we lay it out, if necessary. If there are two amendemnts, we put them side by side; and if there is space at the bottom for instructions, we do that. If not, we have to use another page. It's a very, very simple, very ministerial job.

Q And then what does the Board of Election Commissioners do?

A The State Board of Election Commissioners—We generally try to give them an agenda beforehand. They look at it, they ask questions as they always do, and we try to be as responsive as possible. If they have concerns about the proposed order of the ballot, as they almost always do, then order of the ballot is changed.

Q Now, after the Board of Election Commissioners approves the sample official ballot, what occurs then?

A Then the sample official ballot is then distributed to the Election Commissioners in the respective counties, and copies are also sent to the Circuit Clerks. That responsibility is in our office.

Q The responsibility of sending the sample official ballot. Is that correct?

A That's correct.

Q I hand you what has been previously marked as P-137 and admitted into evidenec and ask if you can tell us what that is.

A This is the official sample ballot that came from our office after having been approved by the State Board

of Election Commissioners for the June 3rd, 1986, election.

Q And at the bottom of that sample ballot, I believe there are some instructions. Is that correct?

A That's correct.

Q Who exactly do you send these to?

A These are sent to the chairman of the county election commission and to the Circuit Clerks.

Q Now, with respect to the election on June 3rd, 1986, or this ballot, was that done?

A Yes, sir.

Q And I hand you what has been previously admitted into evidence as P-138 and ask you if you can identify that document.

A Yes, sir. This is a copy of the memorandum that I sent to the chairmen of the county Board of Election Commissioners and the Circuit Clerk for each county. It deals with the official sample ballot.

Q And let me ask you about what has been previously marked and admitted into evidenec as P-139.

A This is a supplemental memorandum that was sent to the chairmen of the county Board of Election Commissioners, and it dealt with the recapitulation sheet that we were asking them to complete and return to our office as required by law. We also mentioned in there the *Kirksey v. Allain* lawsuit, because there were questions about—there were confusing questions, and we enclosed a copy of the *Kirksey v. Allain* Order for their clarity and understanding.

Q Let's talk about that just for a moment. The *Kirksey v. Allain* lawsuit involved judicial primary elections in the state of Mississippi. Is that correct?

A That's correct. Yes.

Q And what had occurred in that regard?

A The judge had issued an Order enjoining the elections; and quite a few people thought that there would be no elections of any nature, because I think the press had indicated that "Judge Halts Elections," and we had

received several calls concerning whether or not there would be any elections at all on June 3rd; and our purpose for sharing this information was to make certain that the people in the counties understood that there would in fact be elections, there would be a special election, and that there would be two amendments that the population should vote on, either in favor of a rejection.

Q And for clarification purposes, the court's Order only enjoined certain elections, or did it permit the election to be held but in certain elections the votes would not be tallied?

A In certain county elections, county judgships, certain county judgeships were permitted. In Circuit and Chancery Court judgeships, none were permitted. For me to try to explain to you which counties were exempt and which counties were approved would be difficult at this time. There was confusion. That's the only reason we sent a copy of the court's Order in *Kirksey v. Allain*, so that they could understand for themselves which elections were enjoined and which elections could be held.

Q And the judicial elections were in fact Democratic primary elections. Is that correct?

A I believe so, yes.

Q And the elections that were held on the constitutional amendments were not a part, actually, of that primary election, but that was a separate election conducted at the same time. Is that correct?

A That's correct. The special election—We sent out the official sample ballot, Exhibit 137. That dealt with the special election; and all citizens, regardless of party affiliation, could vote in that election; and we encouraged voter participation in that election. The concern was at that time, though, that some of the Election Commissioners were concerned as to how they would distinguish between the special election and the primary election, both of which were held on the same day; and we referred them to several cases, with the assistance of the Attorney General's office, that indicated that that prac-

tice was in fact permissible. The people had to be certain to make certain that there was no confusion.

Q I believe that some case law is mentioned on the instructions at the bottom of P-137. Is that correct?

A Right. *Barnes v. Barnett*; and I believe in the memorandum that I sent, we also talked about *Barnes v. Ladner*. I'm not sure. Yes. *Barnes v. Ladner*.

MR. COLE: I believe that's all I have. Tender the witness.

JUDGE JOLLY: You may cross-examine.

CROSS EXAMINATION

MR. HODGE:

Q Mrs. Harvey, I'm going to again hand you Exhibit P-137, which is the sample official ballot. As I understand your testimony, this is the document which was sent to the various Election Commissions at the county level in the state of Mississippi. Is that correct?

A Yes, sir, and Circuit Clerks as well.

Q And at the top of each column, there is a paragraph in bold print, larger print than the remaining part of the ballot. Could you tell me what that is. The first paragraph in each column in large print.

A It purports to represent—Make an assumption, which I don't want to do. I assume it's a summary.

Q A summary of the item to be voted upon?

A I assume so, yes, sir.

Q Who prepared that language?

A This was prepared by the legislature. When the resolutions are approved, they are sent over to the Secretary of State's office, documents division; and they are enrolled. When we get ready to prepare the ballot for the population to acton, we make no changes. We copy and print it—by "it," I mean the resolution—as it comes from the Mississippi legislation.

Q So this is just a verbatim copy of what you received from—

A That's correct.

Q —the legislature.

A Yes, sir. And they were in all capital letters. Everything was identical.

Q And isn't it a fact that in some counties only this language which is in the first paragraph of each column was presented to the voters?

A Are we talking—

MR. SANDERS: If it please the court, object to the form of the question unless he explains what he means by "presented to the voters." Does he mean on the ballot or available to the voters in the polling place or—Object unless he clarifies that.

MR. HODGE: I will attempt to clarify it.

MR. HODGE:

Q Mrs. Harvey, isn't it a fact that the first paragraph of each column was the only material on the ballot at the voting places in some counties in the state of Mississippi on the—in connection with the June 3, 1986, election?

A We talked about that during my deposition, and I stated then that I did not know of my own personal knowledge. I still don't know of my own personal knowledge that only the summary was presented. Not of my own personal knowledge. I do not know.

JUDGE JOLLY: That's been stipulated, hasn't it?

MR. SANDERS: The Special Master made a report on it, Your Honor, that's been filed with the court.

JUDGE JOLLY: You don't dispute it.

MR. SANDERS: Oh, no, sir. No, sir.

MR. HODGE:

Q Mrs. Harvey, do you know when the injunction with regard to the judicial elections was issued by the court before the June 3, 1986, election?

A I'm thinking it was like—The election was on the 3rd, on a Tuesday. I believe it was like that—either that Wednesday or that Thursday.

Q Before the election.

A Before the election, yes.

Q And because of that and other factors, there was a considerable amount of confusion in connection with the June 3 election. Is that correct?

A Yes, sir, because of those factors. Yes, sir.

Q In fact, is it not correct that Secretary of State Molpus, on the day before the election—June 2, 1986—issued a press release in which he noted that there were confusing and chaotic factors with regard to that election?

A Yes, sir. He held a press conference the day before the election. The purpose of that press conference was to clarify for voters who might have been confused that there was in fact a special election being held, and there were two amendments to be considered, and there were primaries to be held as well. The Secretary always tries to alert voters that there will be elections. He did this in the past election as well.

Another purpose for having the news conference was to make a prediction as to the number of voters that would participate in the voting process. We were mainly concerned that there was confusion with the general populace as to whether or not there would be elections at all. Because of the court decision in *Kirksey v. Allain*, a lot of people had called in inquiring as to whether or not all elections were halted; and the purpose for the press conference and the press releases—the purpose was to make certain that voters were informed as to the issues that would be put before them on June 3rd.

Q And so, as I understand it, the actions—or at least some of them—of the Secretary of State's office in connection with this confusion were, number one, your memo of

May 28, 1986, citing the cases that the Election Commission could read to get an understanding of it; and number two, Mr. Molpus's press conference on the day before the election. Is that correct?

A I'm not sure I understood your question.

Q All right. As I understand your testimony, one of the reasons for your memo of May 28, 1986, which was sent to the Election Commissioners prior to the election on June 3, was to advise them of the Kirksey case so that they could read it and make their own determination. Is that correct?

A Well, the court told us to send copies. The court in *Kirksey v. Allain* told us to send copies of the court Order to the respective election officials, and we were also told to call them and officially place them on notice as to the action of the court.

Q And this memo which has been marked as Exhibit P-139 which you sent to the Election Commissioners was the only document that was sent from the Secretary of State's office in connection with the *Kirksey v. Allain* case. Is that correct?

A I believe that's correct.

MR. HODGE: I have no further questions.

MR. COLE: No redirect.

JUDGE JOLLY: Judge Wingate has a question he would like to just clarify.

JUDGE WINGATE: You said there was a lot of confusion during this time period?

A Yes, sir.

JUDGE WINGATE: There was also some primaries going on across the state.

A Yes, sir, there were.

JUDGE WINGATE: And could you name some of those primaries?

A There were two contested Supreme Court Judge races. I believe it was in central Mississippi and the southern part of the state. There were also——

JUDGE WINGATE: That was Judge Reuben Anderson?

A Yes, sir, and Rubel Griffin. There were also local primary elections. That was one of the purposes of the press conference. The Secretary had for the first time a list of all races that were—elections that were being held that particular day, and we were sharing that with the press and with the local people. There were quite a few primary races, some of which were not contested.

JUDGE WINGATE: There was also a Congressional primary too, was there not?

A Yes, sir.

JUDGE WINGATE: That was Mr. Espy?

A It was Espy—and there was another one, I believe. I believe there might have been two, two Congressional races that were contested.

JUDGE WINGATE: Thank you.

JUDGE JOLLY: Thank you very much for your testimony, Mrs. Harvey. We appreciate you being here. Call your next witness.

* * * *

No. 86-1559

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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EDDIE BURRELL, et al.,
*APPELLANTS*

v.

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, et al.,
*APPELLEES*

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**On Appeal from the United States District Court for the Southern District of Mississippi**

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IN THE

# Supreme Court of the United States

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EDDIE BURRELL, et al.,
Appellants
v.

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, et al.,
Appellees

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**On Appeal from the United States District Court for the Southern District of Mississippi**

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## BRIEF IN OPPOSITION TO MOTION TO AFFIRM OR DISMISS

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This brief is filed, pursuant to this Court's Rule 16.5, in opposition to the Motion to Affirm or Dismiss previously filed in this cause by the appellees, William A. Allain, et al., hereinafter referred to as "the State".

## I. THE DISTRICT COURT EXERCISED NO DISCRETION,BUT EXPRESSLY PREDICATED DENIAL OF §5 RELIEF ON THE PLAINTIFFS' FAILURE TO PROVE DISCRIMINATION.

The State would have this Court believe that the judgment below can be reversed only if the District Court "has no discretion to fashion any remedy except to enjoin or set aside an election conducted" in violation of §5. Mtn. at 5. This misconstruction of the appellants' position is easily refuted by the briefest examination of the statement of the first question presented. The District Court's judgment was fatally tainted by its conclusion that the plaintiffs should be required to prove racial discrimination as a prerequisite to relief. Because of that error, the judgment cannot stand.[1]

This Court made plain only two years ago that "[t]he determination of whether a change has a discriminatory impact or effect, which is committed by statute to the Attorney General," plays no part in the fashioning of a remedy for a violation of §5. *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 183 n.36 (1985). As long as sixteen years ago, this Court reversed this very same District Court because "the challenged changes were examined on the merits to determine whether they had 'a discriminatory purpose or effect.'" *Perkins v. Matthews*, 400 U.S. 379, 385 (1971). Notwithstanding the clear teaching of this Court, the District Court asserted in its order denying a preliminary injunction its authority to inquire into the question of discrimination:

> Whether there has been a change ... is not determined by whether the conduct of the election has the purpose or effect of denying the right to vote on account of

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[1] The appellants, however, do not retreat from their contention that a district court which concludes that a prospective election will violate §5 has no discretion to permit that election to proceed. Jurisdictional Statement at 9-11. In determining how to act after the law has already been violated, a court may be said to exercise remedial discretion; where, as here, a court expressly authorizes an illegal act to proceed, it provides no remedy at all, but only a cloak for injustice. In none of the cases cited by the State had a district court concluded that §5 applied to a procedure but nevertheless permitted that procedure to go forward.

> race of color, but we may consider evidence bearing upon that question in fashioning our remedy. Neither party has chosen to present such evidence. The Court considers the absence of such evidence as a factor weighing in favor of the State's position that the conduct of the election should not be enjoined.

App. F at 44a.[2] The Court continued to adhere to this error after trial:

> [W]e deny any relief for the Section 5 violation as it relates to the election date change on grounds that reasons or bases for equitable relief have not been presented that are alleged to have caused an injury resulting from a violation of Section 5 which are independent of Section 2 or which are independent of the alleged constitutional violations.

App. A at 5a. Once the Court concluded that no discrimination had been proven, it did not return to the question of what relief should be ordered for the §5 violation which had been proven, but it simply dismissed the complaint altogether.

Had the Court in fact exercised discretion, it would have weighed "the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by §5." *Perkins, supra,* 400 U.S. at 396. As already noted, J.S. at 11-12, the nature of this change is permanent and irremediable. This is not a routine election of public officials which may be corrected at the next regular election. Rather, this is a special election to amend the Constitution, and it was perfectly plain to the State and the District Court that preclearance was required. *Hampton County, supra*, 470 U.S. at 182; *Garcia v. Guerra*, 744 F.2d 1159 (5th Cir. 1984).

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[2] In fact, the plaintiffs did present evidence of discrimination, in the form of an affidavit from Henry J. Kirksey, one of two black members of the Mississippi Senate. After describing the history of the challenged legislation, Senator Kirksey concluded, "Race was definitely the motivating force in the conception and passage of this legislation and I am convinced that the only reason that this legislation was passed was because Claiborne County is a predominantly black county."

Apart from the question of remedy, it is now quite clear that the District Court erred in ruling that the setting of the date for the 1982 election did not require preclearance under §5. The Justice Department's new regulations implementing §5, superseding those set out in the State's supplemental appendix, provide:

> Any discretionary setting of the date for a special election or scheduling of events leading up to or following a special election is subject to the preclearance requirement.

52 Fed. Reg. 486, 493 (1987) (to be codified at 28 C.F.R. §51.17 (b)). The State proclaims that the legislature has discretion to fix a special election date as it pleases, Mtn. at 3 n.1, and the setting of the 1982 date accordingly should have been precleared under §5. The District Court's failure to so rule requires reversal of its judgment.[3]

## II. THE JUSTICE DEPARTMENT HAS RECOGNIZED THE NEED OF GUIDANCE FROM THIS COURT REGARDING REALLOCATION OF GOVERNMENTAL AUTHORITY.

There is no need for further discussion of the holdings in *Horry County v. United States*, 449 F. Supp. 990 (D.D.C. 1978), and *Hardy v. Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985). However, it should be noted that the State misrepresents current circumstances in suggesting that it "can now basically rely upon the Attorney General's regulations for guidance, to determine which enactments, if any, do not require advance federal review." Mtn. at 15. Even the old regulations, set forth in Supplemental Appendix A, made plain that its illustrations were not intended to be exclusive. In the preamble to its new regulations, the Justice Department expressly noted the difficulty of the *Horry County* question:

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[3] The invalidation of the 1982 election would drastically change the character of the 1986 election. In 1986 the voters thought they were faced with the question of whether or not to retain the version of §112 of the Constitution previously adopted pursuant to S.C.R. No. 519. Had the voters known that the original version of §112 was still in effect, they would have been faced in 1986 with the entirely different question of whether to retain the requirement of true equality in property taxation.

> While we agree that some reallocations of authority covered by Section 5 (e.g., implementation of "home rule"), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from non-covered reallocations to enable us to expand our list of illustrative examples in a helpful way.

52 Fed. Reg. 486, 488 (1987). This Court should note probable jurisdiction of this appeal to provide the guidance in this area which the State admits is essential and which the Justice Department admits it cannot provide.

## III. THE STATE IS RESPONSIBLE UNDER SECTION 5 FOR THE FAILURE OF THE COUNTY ELECTION OFFICIALS TO PRINT H.C.R. NO. 41, IN ITS ENTIRETY, ON ALL BALLOTS.

The District Court correctly recognized that "state law [Miss. Code Ann. §23-5-141 (1972)] required that the proposed constitutional amendment be printed *in full on the ballot.*"[4] App. A at 5a (Emphasis added). The Master's Report demonstrated that §23-5-141 was not followed in at least 33 counties in the 1982 and 1986 elections. There is no support in law for the State's contention, Mtn. at 19, that the appellants should be required to prove that the State had previously complied with the law. Section 5 requires a plaintiff to prove *only* that the defendants administered an election procedure different from that "in force or effect on November 1, 1964." The requirements of §23-5-141 were in existence on November 1, 1964, and a court must "presume that officials will act in accordance with law." *Perkins, supra,* 400 U.S. at 394. If the State wished to prove that its officials had routinely violated the law for 22 years, it bore the burden of so doing.

The State contends that it is not responsible for the county election officials' failure to follow the law. This contention is contrary to the general principles of agency law and the specific holdings of prior election cases. A state may not hide behind the

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[4] The Court thus rejected the State's claim that election officials were not required to print the full text. Mtn. at 20-21 & n.17. The requirement is made applicable to voting machines and electronic voting machines by Miss. Code Ann. §§23-7-21 and -309 (1972). There is no reason for this Court to disturb the District Court's construction of Mississippi law.

wrongful acts of an agent acting under the state's authority. "States cannot avoid §5 responsibilities by delegating them to political parties." *South Carolina v. United States,* 585 F. Supp. 418, 424 (D.S.C. 1984). The county election commission takes the character of a state agency from the duties imposed by state statutes. *Smith v. Allwright,* 321 U.S. 649, 663 (1944). Indeed, this same District Court has specifically recognized that county and municipal registrars and election officials act as the State's agents. *United States v. Mississippi,* 256 F. Supp. 344, 349 (S.D. Miss. 1966). Plainly, the State is responsible for the §5 violations of law by any of its election officials.

## IV. ALTHOUGH INDIVIDUAL PLAINTIFFS CAMPAIGNED IN THE REFERENDUM, THE INABILITY OF THE BOARD TO MOUNT A COLLECTIVE CAMPAIGN WAS THE RESULT OF PAST AND PRESENT DISCRIMINATION.

The appellants reiterate that the District Court erred in focusing on their own campaign activity instead of equal access of black voters to information regarding H.C.R. No. 41. As earlier demonstrated, J.S. at 21-22, it is plain that H.C.R. No. 41 became less popular as more information became available. The decision to truncate the campaign period indisputably strangled the flow of information to the electorate. Since the testimony is undisputed that more time is necessary to educate and organize black voters than white voters, the deprivation of information unquestionably had a discriminatory effect upon the black electorate.[5]

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[5] The record indisputably reflects that white voters were better able to obtain information for themselves, based upon their more extensive resources and political experience. This was dramatically demonstrated by the testimony of Stone Barefield, attorney for the Board of Supervisors in Forrest County, who first took his seat in the Mississippi House of Representatives in 1960, long before most blacks could vote. Through the use of his county's computer, he was able to demonstrate that taxes would only be reduced on homes valued at $70,000 or above. By taking these facts to the local newspaper and television station, the Forrest County Board was able to defeat H.C.R. No. 41 at home and in the adjoining counties. Trial transcript at 361-69. Because black counties lack the sort of expertise and resources which Mr. Barefield had acquired during twenty-six years of political experience in his county, this sort of information was not made available in black areas before the June election.

In dwelling upon the supposed conduct of the plaintiffs, the District Court simply asked the wrong question.[6]

The suggestion that there was no campaign by these plaintiffs simply is not supported by the record. Supervisor Butler testified that he and another supervisor worked extensively with the N.A.A.C.P. and local ministers within Claiborne County. Trial transcript at 257-60. The District Court expressly acknowledged Butler's testimony that he had contacted black leaders outside the county. Compare App. A at 27a with trial transcript at 276-80. The Court disregarded these efforts because the full Board of Supervisors did not mount a coordinated and collective campaign. The rationale of the opinion is drawn entirely from the Court's own leading questions from the bench:

> JUDGE JOLLY: Did the majority of the Board say that "The best thing to do is to fight this in the courts because we can't win it at the election"?
>
> A. Yes. Yes.
>
> JUDGE JOLLY: And that was the conclusion of the Board.
>
> A. That was the conclusion of the Board.

Trial transcript at 292.

What the District Court failed to acknowledge was that this certitude of defeat was the result of the very discriminatory conduct which was challenged in the complaint. Supervisor Butler later explained why the majority of the Board felt they would lose the referendum:

> [T]hey felt that in order to really — well, in order to really get out there and let people know or get advice on what to do, you know, to bring it to the attention of groups like the — let's say the supervisors' association, you really have to sit down and discuss the ramifications of it in reference to each individual county; and this takes time.

Trial transcript at 303-04. Had the State given the plaintiffs seven months instead of seven weeks to discover and discuss those

[6] Aside from the District Court's mistakes of legal analysis, many of its recitations of supposed facts are clearly erroneous on this record. See J.S. at 17 nn.15-16, 19 n.19.

ramifications, the outcome could have been entirely different.

In one obviously misprinted footnote, Mtn. at 22 n.18, the State seems to be renewing its attack upon the plaintiffs' standing to bring this litigation. The Justice Department's regulations make plain that the Voting Rights Act protects the right to campaign, as well as the right to vote. The list of examples includes:

> Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of Section 5.

52 Fed. Reg. 486, 492 (1987) (to be codified at 28 C.F.R. 51.13(k)). The record in this case plainly reflects that this personal right of the plaintiffs was violated, and they indisputably have standing to assert the violations of their own rights.

## V. THIS COURT HAS JURISDICTION TO RESOLVE THE QUESTIONS OF LEGISLATIVE PURPOSE PRESENTED BY THE JURISDICTIONAL STATEMENT.

The District Court held that the Tax Injunction Act, 28 U.S.C. §1341, deprived it of jurisdiction over the appellants' constitutional claims. App. A at 16a. Albeit without explanation, the Court necessarily concluded, in the words of §1341, that the appellants' complaint sought to enjoin "the assessment, levy or collection" of a state tax and that "a plain, speedy and efficient remedy" existed in the courts of Mississippi. As the appellants have previously argued, J.S. at 28 n.34, these unexplained conclusions are plainly incorrect.[3]

The inability of state authorities to consider federal claims has previously led to the rejection of defenses based on §1341. In *Township of Hillsborough v. Cromwell,* 326 U.S. 620 (1946), New Jersey authorities argued that their law afforded a sufficient remedy to the protesting taxpayer. This Court, however,

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[3] The District Court also held that §1341 did not bar consideration of appellants' claims under the Voting Rights Act, App. G at 47a, and the State does not challenge this indisputable conclusion. As the appellants earlier explained, J.S. at 23 n.25, their claims of intentional discrimination are cognizable under §2 of the Voting Rights Act. Accordingly, even if the District Court properly dismissed the constitutional claims, this Court must still resolve the fifth question presented by the Jurisdictional Statement.

rejected that argument, noting that "the State Board of Tax Appeals to which respondent might have appealed concededly has no right to pass on constitutional questions." *Id.*, at 625. The only statutory proceeding available to the appellants in Mississippi involves a hearing before the appellee State Tax Commission pursuant to Miss. Code Ann. §§27-35-309 and -311 (1972). The appellants duly sought such a hearing, but the Commission refused to grant one, citing its inability to resolve constitutional objections.[8] Moreover, the Commission has sought to dismiss the concurrent litigation in state court for want of jurisdiction. See Affidavit in Support of Motion to Strike.[9] As the Court held in *Township of Hillsborough,* "In any event, there is such uncertainty concerning the New Jersey remedy as to make it speculative...." 326 U.S. at 625. Accord, *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 516-17 (1981); *Tully v. Griffin, Inc.,* 429 U.S. 68, 76 (1976). Any notion that a Mississippi court might award relief under these circumstances is speculative at best.

Nor do the appellants seek to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." They seek only to preserve the right of Claiborne County to collect its ad valorem tax from the owners of the property at Grand Gulf, as it has always done; whether the State also collects its in-lieu tax on that property is of no concern to them. The Fifth Circuit upheld the exercise of jurisdiction in a similar case "because it seeks not to inhibit the collection of taxes, but to require the collection of additional taxes." *Appling County v. Municipal Electric Authority of Georgia,* 621 F.2d 1301, 1303-04 (5th Cir. 1980). Accord, *Hargrove v. McKinney,* 413 F.2d 320, 326 (5th Cir. 1969), on remand, 313 F. Supp. 944 (M.D. Fla. 1970), reversed on other grounds *sub nom. Askew v. Hargrove,* 401 U.S. 476

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[8] The lack of a statutory remedy is sufficient to distinguish this case from *Bland v. McHann,* 463 F.2d 21 (5th Cir. 1972), cert. denied, 410 U.S. 966 (1973). In that case, the District Court relied upon the availability of statutory procedures to seek a tax refund. *Id.*, at 28-29. Here, by contrast, the State Tax Commission has expressly refused to implement the procedures specifically governing the relief sought by the appellants, the return of Grand Gulf to the tax rolls.

[9] The appeal from the Chancery Court's dismissal of that litigation is now scheduled to be argued before the Supreme Court of Mississippi on July 16, 1987.

(1971). See also, *Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1176-77 (9th Cir. 1984) (§1341 has no application because requested relief was directed at spending program rather than revenues); *Board of Education v. Bosworth,* 713 F.2d 1316, 1319-20 (7th Cir. 1983) (attempt to compel distribution of collected taxes in accordance with state law was not precluded by §1341).

The State has remarkably little to say with regard to the merits of the fifth and sixth questions presented by the Jurisdictional Statement. In denying that the legislature was motivated by discriminatory intent, the State says nothing to explain why the legislature acted as it did. Its citation, Mtn. at 27 n.23, to *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711 (1983), a Title VII case, is truly remarkable. In that case, this Court reaffirmed that a plaintiff may succeed by demonstrating that the defendants "proffered explanation is unworthy of credence." *Id.,* at 716, quoting *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981). The only explanations ever proffered by the State were thoroughly demolished by the evidence. J.S. at 24-25 n.28. Even the State was not so bold as to suggest that mere political clout, the basis finally accepted by the District Court, could serve to support these measures.

## CONCLUSION

For the reasons stated herein and in the Jurisdictional Statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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